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ENGLISH

CASES IN CHANCERY.

BEFORE THE LORD CHANCELLOR, LORD BROUGHAM; SIR LANCELOT SHADWELL, VICE-CHANCELLOR OF ENGLAND; AND SIR JOHN LEACH, MASTER OF THE ROLLS.

Hewes *v.* Hewes.

4 *Simons*, 1.

Where in an examination put in by two co-executors, it was stated that their receipts had been joint, but it appeared, by affidavit, that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination, to correct the mistake.

June 21; July 6, 1830.

THE defendants, Balls and Cossar, were the executors and devisees in trust of Joseph Hewes, deceased. On the 23d of November, 1829, they put in a joint examination to interrogatories which had been exhibited, before the Master, for their examination as to their receipts and payments in respect of the real and personal estates of the deceased.

A motion was now made, on Balls' behalf, for liberty to put in a further examination, by way of supplement to the joint examination, the purport of which was set forth in the notice. In support of the motion, Balls made an affidavit, in which he deposed that, in the examination put in, on the 23d of November, 1829, he, and, as he believed, Cossar, truly set forth the sums which had been received on account of the testator's estate, and those which had been paid by each of them, and that the payments in the examination, stated to have been made by the deponent and Cossar, jointly, was, so far as the same consisted of payments made by the deponent, just and correct, and he believed also that the same was just and correct, so far as it consisted of receipts and payments by Cossar; but that it was erroneous in setting forth the receipts and payments, as if

the same had been made by the deponent and Cossar jointly, for that they did not jointly receive or pay any sum on account of the testator's estate, but that all their receipts and payments were distinct and separate, and that they did not keep any joint account; and that, when the defendants put in their answer to the bill, and, afterwards, when they put in their answer and examination, the deponent conceived that it would be more simple and intelligible, and less expensive to the parties interested in the testator's estate, to make up his and Cossar's separate accounts into one general account: That he had no suspicion that, by setting forth all the receipts in one examination, he could make himself liable for the moneys separately received by Cossar: That, at the time when the joint examination was put in, the deponent believed that the statements therein contained would be understood as expressing, what he intended to express and believed to be true, viz. that all such receipts and payments as therein mentioned, had been made by him or Cossar, one or the other of them; and that he did not believe or suspect that, by putting in the joint examination, he could make himself liable for any sum which had come into the separate possession of his co-executor: That the deponent had not, nor had any person or persons by his order or for his use, or with his privity or consent, received any sum whatever belonging to or arising from the real or personal estates of the testator, and that the sums received by Cossar did not come to his hands by the direction or with the consent of the deponent: That the payment of the sums which, in the joint examination and the schedule thereto, were stated to have been expended by the deponent and Cossar, were erroneously stated as having been made, jointly, by them, the deponent never having made any payment whatever, jointly, with his co-executor; and that the only sums paid by the deponent up to the time of putting in the examination, consisted of certain sums mentioned in the affidavit.

An affidavit was made, in opposition to the motion, by a clerk to the plaintiff's solicitor, who deposed that the answer of the defendants was sworn on the 29th of December, 1827, and their examination on the 23d of November, 1829; that the plaintiff's charge against both the defendants, was carried into the Master's office on the 4th of February following, and that on the 8th of the same month, the charge was allowed; and the defendants, on the 5th of March, brought in joint discharges which they had appeared by their solicitor to sustain, but had failed in so doing, and had had a peremptory time given them, by the Master, which had expired.

Mr. Knight and Mr. K. Parker appeared in support of the motion, and said that liberty had been given under precisely similar circumstances, to an executor to put in a further examination, in Wood *v.* Lindsay, on the 12th of February, 1827.

Mr. Wilbraham, for the plaintiffs:

Wood *v.* Lindsay turned on its own special circumstances.* In that case, the same solicitor was employed both for the plaintiffs and for the

* In the case of Wood *v.* Lindsay the receipts of Lindsay and his co-executor were stated, in the examination, to be joint, whereas they were, in fact, several: and, on the ground that the mistake had arisen from the same solicitor being employed both by the plaintiffs and the defendants, the court allowed Lindsay to put in a further examination for the purpose of correcting the mistake.

defendants, and Lindsay had not that attention paid to his interest which he would have had, if he had employed a separate solicitor. Here one solicitor was employed for the plaintiff, and another for the defendants. The examination states the receipts to have been joint, and the answers put in by these defendants corresponds, in that respect, with the examination. Is this defendant to be allowed to contradict both the answer and the examination?

[The Vice-Chancellor:—That ought to be established, for it is very important.]

The charge was carried in, before the Master, in February last, and the Master charged this defendant with the whole of the receipts. He then took in his discharge and attempted to verify it, but failed; and then he applies to the court for liberty to put in a further examination, and that, after he had been charged for four months. Can he be now heard to say that he was mistaken? This executor does not say that he received one sum, and that his co-executor received another, but that he has received no sum of money whatever. In that respect this case is unlike Wood *v.* Lindsay. Is it to be endured that an executor, who has admitted that he received some sums of money, should be permitted to say that he has not received a single sum? He has been charged by the Master, and has submitted to it for four months.

[The Vice Chancellor:—Unless the answer is such as Mr. Wilbraham represents it to be, I shall grant the motion.]

July 6.—On reference to the answer, it appeared that, though the receipts were stated to be joint, yet there was not any schedule to the answer; and on this day, his honour said that he should grant the motion, the defendant, Balls, paying, to the plaintiffs, the costs of the application.

Hall *v.* Luckup.

4 Simons, 5.

Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children; the son left four daughters, (one of whom was his eldest child), and a son: Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an eldest son only.

July 14, 1830.

ANN DUDDING, by her will, dated the 7th of October, 1763, gave her land at Cottingwith to her son, John Dudding, subject as therein mentioned; and, to her daughter, Ann Hargreaves, all her land at Melburn, and her close at Horwood, for her life: and she also gave to her daughter the interest of 200*l.* for her separate use; and she declared it to be her further will and mind, that, at the decease of her daughter, the

[Hall *v.* Luckup.—4 Sim. 5.]

land at Melburn and Horwood should, as the rents became due, be equally divided amongst the youngest of her son, John Dudding's children; and that the 200*l.*, if her daughter should leave any children, should be equally divided amongst them; otherwise that it should be divided amongst the youngest of her son's children; and she directed that, in case her son should attempt to sell, or cut off the entail, or sue out a fine of any of the land she should die possessed of, that then her acting trustees should take possession of the land, and receive the rents, as the same became due, for her grandchildren, until they became of age, to act for themselves; and she gave to her daughters, Mary Gorton and Ann Hargreaves, all that should be found in a large fir deal box in her house at Cottingwith, to be equally divided between them; and she likewise gave, to them, all her wearing apparel, to be equally divided between them; and, if it should happen that either of her daughters should die before her, the surviving daughter to have all her wearing apparel and half her linen, and the other half of the linen, in her box, she gave unto the youngest children of her son, John Dudding, to be equally divided amongst them; but, if both her said daughters should die before her, then she gave the linen and wearing apparel to their daughters, if they should have any, otherwise, to the youngest children of her son John, to be equally divided between them. And the testatrix declared that, being in possession of a close, which she had in mortgage from Edward Rutherford deceased, which could not be settled till his youngest child was of age, she gave the said close or money, whichever it might happen to be, to her son, for his life, and, after that, to his youngest children, to be equally divided as the rest; but, if he should have sons, the testatrix declared that she did not intend that his eldest son should have any of the above dividends, as he would be entitled to his father's estate; but, if all her son's children should die, then she gave all the land that she was possessed of, to her son, for his life, and, after his decease, to her grandson, Jonathan Gorton, and his heirs, for ever, by his mother's side. And the testatrix gave to her son, his heirs and executors, for ever, all the residue of her real and personal estate, subject as therein mentioned; and she appointed him sole executor of her said will, and she appointed William Holding and Thomas Coulton acting trustees with her son.

The testatrix died on the 27th of January, 1771, and left three children living; viz: John Dudding, her only son and heir-at-law, Ann, the wife of Allen Hargreaves, and Mary, the wife of E. Gorton. John Dudding died in August, 1811, leaving six children; namely, the plaintiff, Ann, the wife of the plaintiff Edward Hall, Sarah Dudding, Mary Dudding, Elizabeth Dudding, John Hicks Dudding, his heir-at-law, and the defendant, Emma, the wife of John Luckup, of whom Sarah and Mary were born after the death of the testatrix.

Upon this cause coming on for further directions two questions were discussed: first, whether Mrs. Hall, who was the eldest child of John Dudding, was entitled to participate in the benefits given, by the will, to the youngest children of John Dudding; second, what interest those children took in the testatrix's real estates.

The Solicitor-General, Mr. Horne, Mr. Roupell, Mr. Spence and Mr. L. Lowndes appeared for the different parties.

The Vice-Chancellor said that the testatrix had put her own con-

struction upon the expressions "youngest children," and that she meant by it all the children of her son, John Dudding, except his eldest son; and that she intended them to take the fee-simple of the lands devised to them.*

Loscombe *v.* Russell.

4 *Simons*, 8.

A bill to have the accounts of a partnership taken without praying for a dissolution, is demurrable.

July 24, 1830.

THE plaintiffs and the defendants were copartners, as carriers on the Western Road, under articles of copartnership, for seven years from the 1st of July, 1822, "and so from seven years to seven years, till determined by notice." The first period of seven years having expired and no notice of dissolution having been given, the partnership was continued for another period of seven years, of which one year had elapsed at the time when the bill was filed. It charged that the defendants were indebted, to the plaintiff, in respect of the profits of the partnership received by them, and praying for an account of the dealings and transactions of the partnership from the foot of an account which had been settled on the 30th of June, 1827, that the defendants might account for all the moneys received by them, from the partnership business, since that time, and that the plaintiff's share of such moneys, after paying the partnership debts and making all just allowances, might be paid to him. The defendants put in a general demurrer.

Mr. Knight and Mr. Wright, in support of the demurrer:

The doctrine that a bill to have copartnership accounts taken, will not lie, unless a dissolution is prayed, has been frequently recognized by Lord Eldon. Forman *v.* Homfray, 2 V. & B. 329; Marshall *v.* Colman, 2 J. & W. 266; Kinder *v.* Taylor.† At the time of the Master's signing his report, an event might happen which would totally change the balance. How is the stock to be valued? At what period is the account to stop? If there has been no breach of duty on the part of the defendants, the plaintiff has nothing to complain of; if there has been a breach of duty, he may ask for a dissolution.

The Solicitor-General and Mr. Campbell in support of the bill:

No case deciding that accounts of this sort may not be taken, can be produced; there are *dicta* only to that effect. It appears, from the brief in Forman *v.* Homfray, with which we have been furnished, that the plaintiff there prayed for an account which was to be continued until the end of the term of the partnership. In Marshall *v.* Coleman, the bill

* See Heneage *v.* Hunloke, 2 Atk. 456; Pettywood *v.* Coote, Cro. Eliz. 52.

† Not yet reported.

[Loscombe *v.* Russell.—4 Sim. 8.]

prayed for one of the strongest injunctions, and for interim management, which could not be granted without asking for a dissolution. Kinder *v.* Taylor does not at all embrace the point. In the case now before the court, the plaintiff would not have been warranted in asking for a dissolution, for the case made is not one of exclusion, or of receiving what the defendants ought not to have received, but of mere withholding of payment. The only ground for asking for a dissolution, is exclusion or mismanagement. The plaintiff's only remedy is to come into a Court of Equity for an account and payment of what is due to him. The account cannot be taken at law. There is no difficulty in limiting the account to the time when the bill was filed; there are times fixed, by the articles, at which the accounts are to be taken and the balances are to be paid. It is a past wrong that the plaintiff complains of. The defendants ought to have paid the balances found due on each settlement of the accounts. It is not the capital, but the current profits of the partnership, that this bill relates to. Harrison *v.* Armitage, 4 Madd. 143, and Knowles *v.* Houghton, 11 Ves. 168, are authorities in support of the present bill.

This question is not a proper one to be decided on demurrer. The bill prays for general relief: and, therefore, at the hearing, the plaintiff may ask for every thing that is incidental to the account, and, consequently, for a dissolution.

The Vice-Chancellor:—I take this to be a bill which purposely avoids the prayer for a dissolution; and that it was not in the contemplation of the plaintiff that the partnership should be put an end to. It would, therefore, be a surprise upon the parties to this record, if I were to deal with it as if a dissolution were sought. Here the partnership is still subsisting; and the bill is filed for an account merely of the dealings and transactions of the partnership.

With respect to the law of this court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord Eldon upon this subject has been, from time to time, expressed both before and since the decision of Harrison *v.* Armitage. Suppose that the court would entertain a bill like the present, and direct an account to be taken of the dealings of a partnership, and that it appeared, by the Master's report, that a balance was due, from the defendant to the plaintiff; then, upon further directions, the plaintiff would ask for an order, that the balance might be paid to him: it would, however, be competent to the defendant to file a supplemental bill, in order to show that, since the account was taken, a balance had become due, to him, from the plaintiff, after giving the plaintiff credit for the amount found due to him by the Master: and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the court put an end to it.

This court will not always interfere to enforce the contracts of parties; but will, in some instances, leave them to their remedy at law; as in the cases of agreements for the purchase of stock or for the building of houses. With respect to occasional breaches of agreements between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands neuter: but, when it finds

that the acts complained of are of such a character as to show that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the court will decree it, although it is not specifically asked. Here a dissolution is not prayed for; and, if the court were to do what is asked, it would not be final.

Having regard then to the opinion expressed, by Lord Eldon, both before and after the decision in Harrison *v.* Armitage, my settled opinion is that this bill cannot be maintained; and, therefore, the demurrer must be allowed.

Ex parte Chester in re Yates.

4 *Simons*, 12.

The 12th of the new orders applies to affidavits in bankruptcy, which have been referred for scandal and impertinence.

July 29, 1830.

Rankin *v.* Huskisson.*

4 *Simons*, 13.

Injunction granted to restrain the commissioners of woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site.

August 7, 14, 1830.

BY 7 Geo. 4. c. 77, the commissioners of woods and forests were empowered, with the consent and approbation of the lords of the treasury, to lease, or previous to any such lease, to enter into any contract for leasing, all or any part of the houses, buildings and hereditaments, which should be erected on the site of Carlton Palace and the gardens and grounds thereto belonging, to any person or persons whomsoever, for any term or terms of years, not exceeding ninety-nine years, at such rent or rents, to be reserved and made payable to his majesty, his heirs and successors, and for such fine and fines, and under and subject to such covenants, conditions, clauses and restrictions, and in such manner as the said commissioners should, from time to time, with such consent and approbation as aforesaid, judge proper and think most advantageous. In 1826, an application having been made to the commissioners on behalf of the United Service Club, for a lease of part of the ground comprised in the act, for the purpose of erecting a new club-house thereon; the parties were referred to the secretary of the commissioners, who showed them a plan of the ground; and a portion of it, adjoining on the south to another piece of the ground comprised in

* *Ex relatione.*

[Rankin *v.* Huskisson.—4 Sim. 13.]

the act, and which was described in the plan as being intended to be laid out as an ornamental garden, was marked out and allotted for the club. An agreement was afterwards entered into, between the commissioners, with the approbation of the lords of the treasury, and the building committee of the club, that a lease for ninety-nine years of the piece of ground so marked out, should be granted to the trustees of the club, and that the plot of ground on the south side of it should be laid out, as an ornamental garden, and that no buildings whatever should be erected thereon. The plan was afterwards submitted to and approved of by the lords of the treasury, and was laid, by the commissioners, before the House of Commons; and the new club-house was built on the site marked out. After it was completed, the defendants, Huskisson and Lawley, began to build stables on the plot of ground on the south side: upon which the bill was filed, by the trustees of the club, on behalf of themselves and the other members, against those defendants, the lords of the treasury, the commissioners of woods and forests, and the attorney-general. It alleged, that the commissioners, in concert with Huskisson and Lawley, (who, it was alleged, had entered into some contracts with the commissioners for that purpose), had begun to build the stables on the plot of ground intended for the ornamental garden, and so near to the club-house as to exclude the light and air from it. The bill charged that the commissioners ought to execute, to the plaintiffs, a lease of the ground on which the club-house had been erected, with proper covenants, so as secure to the club the laying out and keeping the plot of ground on the south side as an ornamental garden: that the lords of the treasury and *the attorney-general, on behalf of his majesty*, claimed some interest in respect of the piece of ground agreed to be leased to the club, and of the rights or claims by the plaintiffs, on behalf of the club, over the plot of ground on the south side of the club-house. The bill prayed that the agreement entered into with the commissioners of the woods and forests might be specifically performed; that it might be declared that the club were entitled to have the plot of ground on the south side of the club-house, laid out and continued as an ornamental garden, till the end of the term of ninety-nine years; that it might be referred to the Master to settle a proper lease, with a covenant to that effect, and that the commissioners, and Huskisson and Lawley, might be restrained from proceeding with the erection of the stables, and from permitting such parts thereof as had been erected from continuing on the garden or plot of ground.

A motion, for the injunction, supported by affidavits, was made by Sir Charles Wetherell, Mr. Pepys and Mr. Spence, and was opposed by the Solicitor-General and Mr. Roupell. The question principally discussed, was, whether the case made by the will was substantiated by the affidavits, plans and other documents produced in support of it. One of the points which was raised, but not pressed, in opposition to the motion, was that the court had no jurisdiction to grant an injunction against the commissioners of woods and forests, as being ministers of the crown.

The Vice-Chancellor, however, after commenting upon the documents at considerable length, concluded his judgment as follows: "Upon the whole, my opinion is that the commissioners of woods and forests are not justified in erecting the buildings in question; and therefore the injunction must go to restrain the prosecution of those buildings which

have been commenced, and the erection of any further buildings in front of any portion of the southern base of the ground on which the house of the United Service Club stands."

At the conclusion of the judgment, the plaintiffs' counsel asked that the order might provide for the removal of the buildings which had been commenced; as had been done by Lord Eldon in the case of the Glamorganshire canal.

The order which was drawn up, was as follows: "this Court doth order that an injunction be awarded to restrain the defendants, their agents and workmen, from continuing the projected buildings, or commencing any other buildings whatever, on the garden or plot of ground described in the pleadings in this cause, or any part thereof: and also from permitting such part of the said buildings as have been already erected on the said garden or plot of ground, from remaining thereon, until the defendants shall fully answer the plaintiff's bill, or this Court make order to the contrary."

Bilton *v.* Bennett and Wife.

4 *Simons*, 17.

Mode of proceeding to take a bill *pro confesso* against a defendant in contempt for want of answer, and who is in custody of the warden of the Fleet.

November 1, December 13, 1830.

THE defendant Bennett had put in an answer to the bill, in which his wife did not join, and no answer had been put in by her, nor had any order been obtained for them to answer separately. Bennett being in contempt for want of the joint answer of himself and wife, and being in the custody of the warden of the Fleet, for contempt in another cause, was now brought to the bar of the court by *habeas corpus*, for the purpose of having the bill taken *pro confesso* against him. But the Vice-Chancellor ruled that the bill could not then be taken *pro confesso* against the defendant, but that, under 11 Geo. 4. and 1 Will. 4. c. 36, Rule 2d, he must be remanded to the Fleet; that another writ of *habeas corpus* must be issued, returnable in twenty-eight days; and, if the answer was not put in at the return of the writ, the clerk in court ought to attend with the record, and the bill be then taken *pro confesso:* and an order was made accordingly.

On this day, the second *habeas corpus* being returned, and no joint answer having been put in by Bennett and wife, and the clerk in court attending with the record,

Mr. Ching moved that the bill might be taken *pro confesso* against them.

The Vice-Chancellor at first hesitated about making the order, thinking that the act did not apply to a case where a husband was in contempt for want of his wife's answer. But his Honour ruled that, as

no order had been obtained for the husband and wife to answer separately, the husband's answer ought to be treated as a nullity, and made the order.

Cockburn *v.* Raphael.

4 *Simons*, 18.

ON this cause coming on to be heard, it was alleged that the suit had abated; in consequence of which it was ordered to stand over. The suit was afterwards revived; and the question was whether it was necessary that new subpœnas to hear judgment should be served. The Vice-Chancellor, upon the point being mentioned to him by Mr. Kindersley, said that new subpœnas were necessary.

November 14, 1830.

Tollner *v.* Marriott.

4 *Simons*, 19.

Testator gave 100*l.* to each of the children of his sisters, provided they claimed the same within five years after his decease, by writing under their hands, delivered to his executors. No claim was made by the children in the manner prescribed; but within the five years a bill was filed by the residuary legatees to have the testator's estate administered: Held, that the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit.

November 10, 16, 1830.

PATRICK BAVETT, by his will, dated in 1774, gave, to each of the sons and daughters of his sisters Sarah and Elizabeth Rooney, who should be living at his decease, 100*l.*, to be paid to them in London or remitted to them in Dublin, provided they should claim the same within five years from the day of his decease, by a writing under their hands, and delivered to his executors, and not otherwise.

The testator died on the 10th of November, 1806.

Elizabeth Barnes, one of the daughters of Sarah Rooney, died in November, 1821; and Luke Rooney, one of the sons of Elizabeth Rooney, died in December, 1810. None of the children of Sarah and Elizabeth Rooney had claimed their legacies in the manner prescribed by the testator; but, within five years after the testator's death, a bill was filed by the residuary legatees (to which, however, none of the children of the testator's two sisters were parties), for the purpose of having the assets of the testator administered by the court.

Patrick Rooney having obtained letters of administration both to Luke Rooney and to Mary Barnes, presented a petition, alleging that each of

those two persons was entitled to a legacy of 100*l.*, under the bequest before mentioned, and praying to be paid those legacies.

The Solicitor-General and Mr. Kindersley, for the petitioner, said that the filing of the bill relieved the legatees from the necessity of claiming their legacies in the manner pointed out by the testator, as the court, and not the executors, had to pay the legacies.

Mr. Pepys, Mr. Knight, Mr. Wray and Mr. Rolfe, *contrà*, said that Luke Rooney and Mary Barnes had not entitled themselves to be paid the legacies, as they had not claimed them in the manner which was very particularly pointed out by the testator, and, consequently, had not performed the condition upon which the legacies were given: that the filing of the bill was not a sufficient demand, as they were not parties to the suit.

The Vice-Chancellor (after stating the clause in the will above set forth) continued as follows:

In respect of two legacies, of 100*l.* each, claimed by the petitioner as representative of Luke Rooney and Mary Barnes, it has been made a question whether they were entitled to those legacies, inasmuch as they did not claim them within five years after the day of the testator's decease.

It has been admitted, as a fact, that there was a bill filed within five years after the testator's death, for the purpose of administering the assets of the testator. In the case of Franco *v.* Alvarez, 3 Atk. 342, where the testator had directed that certain benefits should be given to his son's creditors, provided they gave his son a release within four months; and, two days before the expiration of the four months, a bill was filed, by some of them, on behalf of all of them, for the purpose of having the benefits intended by the will, Lord Hardwicke held that that was a sufficient compliance with the condition. It appears to me, therefore, that it must be considered, according to the authority of that case, that a bill filed for the administration of all the estate, and for the payment of all the legacies, must be taken as equivalent to a demand, by each of the legatees, for his legacy.

Breashur *v.* Dor.

4 *Simons*, 21.

Testator gave 1000*l.* to his natural son, and, if he died under twenty-one, then that sum and the residue to go to the testator's family: and he gave the residue to his natural son, to be applied as above directed. The son died under twenty-one. Held, that the 1000*l.* was part of the residue, and did not pass to the testator's next of kin as a legacy.

November 16, 1830.

WILLIAM LATTY, the testator in this cause, by the third clause in his will, directed that the sum of 1000*l.* should be given to his natural son William Latty, the interest to be applied, by his executors, for his

[Cousins *v.* Schroder.—4 Sim. 23.]

maintenance, and the principal to come to his possession at his attaining the age of twenty-one years: "and, in case my said son shall die before his attaining that age, then the bequest under this clause, and the residue, to go to my own family, generally." The testator disposed of his residuary estate in the following words:—"All the rest, residue and remainder of my property, shares in the Golden-lane Brewery, shares in the Hope Fire and Life Insurance Office, and of every other description not herein mentioned, I give and bequeath to my said natural son, to be applied as directed in the third clause of this my will."

The testator's estate was insufficient to pay his legacies in full; and 657*l.* three per cents had been transferred into the name of the accountant-general in trust in this cause, the legacy account of the defendant William Latty. He afterwards died, under twenty-one; and the testator's next of kin presented a petition, praying (amongst other things) that the 657*l.* three per cents might be sold, and the proceeds divided amongst the petitioners; and the question was, whether the petitioners were entitled to the stock as legatees designated to take the legacy in the event of William Latty dying under twenty-one, or as part of the residue; in which case it would be applicable to make good the deficiency of the testator's estate for payment of the other legatees.

The Solicitor-General, Mr. Rolfe, Mr. K. Parker and Mr. Wright appeared for the petitioners and the executor of the testator.

The Vice-Chancellor held, that the 657*l.* three per cents must be considered as part of the residue of the testator's estate, and that it did not pass to the petitioners, as a legacy, under the third clause in the will.

On the 16th of February, 1831, Lord Brougham, C. affirmed the above decision.

Cousins *v.* Schroder.

4 *Simons*, 23.

Testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life, and directed that, at the end of twelve months after her death, 1000*l.* should be laid out in trust for his daughter for life, and after her decease to divide the capital amongst her children, when they should attain twenty-one. One of the children attained twenty-one and died in the lifetime of testator's widow: Held, that his representatives were entitled to a share of the 1000*l.*

November 17, 1830.

HERMAN SCHRODER deceased, gave all his real and personal estates, after payment of his debts, funeral expenses and legacies, to his wife, for her life, and he directed that, at the end of twelve months next after his death, 1000*l.* should be laid out, in government securities, in the names of trustees, in trust to pay the dividends and interest thereof, to his daughter Hannah, the wife of J. Cousins, for her separate use, for her life, and, upon her decease, to divide the capital unto and amongst all the

children of his daughter Hannah, when and as they should respectively attain the age of twenty-one years, equally share and share alike; but in case of the death of any or either of the children of Hannah Cousins, before attaining such age, then to divide the respective shares or share of such children or child so dying, amongst the survivors, at their like age of twenty-one years. And the testator directed that, at the end or expiration of twelve months next after the decease of his said wife, the further sum of 1000*l.* should be laid out, in government securities, in the names of the trustees, for the benefit of his daughter Hannah and her children, upon and for such and the like trusts, ends, intents and purposes, as he had before directed respecting the first mentioned sum of 1000*l.*

The testator died in 1812. J. R. Cousins, one of the sons of John and Hannah Cousins, attained twenty-one, and died in July 1813, which was within twelve months after the death of the testator. John Cousins died in 1815, leaving issue seven children by Hannah Cousins his wife. In June, 1822, Hannah Maria Cousins, another of the children, died, having attained twenty-one. In September of the same year, Mary Schroder, the testator's widow, died; and, in April, 1830, Hannah Cousins died. Neither of the sums of 1000*l.* had been laid out in the manner directed by the testator.

Upon the hearing of a petition in this cause, the questions were, whether J. R. Cousins and Hannah Maria Cousins had, at their deaths, vested interests in shares of the two sums of 1000*l.*

Mr. Sidebottom and Mr. Beames, in opposition to the claims of the representatives of J. R. Cousins and Hannah Maria Cousins, said that the time at which the testator had directed the legacies to be appropriated, was annexed to the substance of the gift, and that, in order to acquire vested interests, the legatees must be living at the time when the legacies were to be paid. They cited Cruse *v.* Barley, 3 P. W. 20, and Billingsley *v.* Wills, 3 Atk. 219.

The Vice-Chancellor said that, if the children lived to attain twenty-one, they were capable of taking, although they died before the time of payment.

"Declare that J. R. Cousins and Hannah Maria Cousins took vested interests in both the sums of 1000*l.*"

Isham *v.* Wallace.

3 *Simons*, 25.

A copy of a faculty granted in 1613 admitted as evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depositary, which was destroyed by the great fire of London.

November 18, 1830.

THIS was a suit for tithes, by the rector of Lamport, in Northamptonshire. The defence set up by some of the defendants was, that their

lands were not situate in the parish of Lamport, but in Faxton, which they alleged to be a separate parish; and, in support of that allegation, they proved that the inhabitants of Faxton had, for a great length of time, christened and buried there, and not in Lamport. On the other hand, the plaintiff stated that Faxton was a chapelry, within or annexed to the parish of Lamport; and he produced, from the custody of Sir J. Isham, the patron of the living, a document, appearing to have been signed by Thomas Ridley, as vicar-general to the archbishop of Canterbury, and which was alleged to be an office copy of a faculty, granted, in 1613, by the then archbishop, allowing the inhabitants of Faxton to christen and bury there: and one of the plaintiff's witnesses deposed that he had searched, in the registers of the archbishop of Canterbury, at Lambeth, for the entry of the original, but had not found it; and that Thomas Ridley was the vicar-general of the archbishop in 1613, and that he believed the document to be an office copy of the original faculty: another of the plaintiff's witnesses deposed, that he had searched in the book kept at the vicar-general's office, which contains a list of all the faculties and records from 1614 downwards, but could not find the original: that, if the original were in existence, it would not be found amongst the records and writings of the court of peculiars, as all registers and entries of such documents, up to 1614, were destroyed by the great fire of London in 1666.

The counsel for the defendants objected to the admissibility of this document, and contended that it was not an office copy, and that the archbishop of Canterbury had no power to grant the faculty, as the parishes of Lamport and Faxton were not within his diocese.

The Vice-Chancellor said that it was not material to discuss whether the document was or was not an office copy, as it came out of the custody of the persons whose rights were abridged by it; and as it appeared, on the face of the instrument, that the archbishop assumed to himself the right to grant the licence, and as there was proof that the original could not be found in the place where it ought to have been, and a reason had been assigned why it was not so found, namely, that it had been destroyed in the fire of London: and his Honour ruled that the document was admissible.

The Solicitor-General, Mr. Pepys and Mr. Boteler, for the plaintiff.

Sir C. Wetherell, Mr. Knight, Mr. L. Lowndes and Mr. Pole, for the defendants.

Baker *v.* Henderson.

4 *Simons*, 27.

The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title deeds (which were in the possession of the plaintiff's solicitor for the purposes of the suit) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit; but the court ordered him to deposit them.

November 22, 1830.

THE plaintiff was a trustee of real estates, under a will. He was in custody for not paying, into court, a balance which the Master had found to be due from him, on taking the accounts directed by the decree. The decree also directed the estates to be sold, and the title-deeds to be produced and deposited with the Master, in the usual manner. The plaintiff's solicitor was in possession of the deeds, and claimed a lien on them, for his costs of the suit, and refused to produce them. The defendants had received a letter, from the plaintiff, authorizing the solicitor to produce and deposit the deeds.

Mr. Pepys, for the defendants, now moved that the solicitor might be ordered to produce and deposit the deeds, as directed by the decree.

The VICE-CHANCELLOR said, that the solicitor had no lien on the deeds anterior to the suit, and that they were in his hands for the purposes of the suit: and his Honour made the order, with costs.

Lees *v.* Sanderson.

4 *Simons*, 28.

A. B. C. D. and E. (the two latter being married women,) take out administration to an intestate, and afterwards appoint C. to be the acting administrator, and direct the creditors to pay their debts to him. C. becomes insolvent: Held, that A. B. and C. and the husbands of D. and E. are responsible for C.'s receipts.

November 26, 1830.

EPHRAIM SANDERSON, by his will, dated the 24th of April, 1820, gave all his real and personal estates to two trustees, in trust for his wife, Elizabeth Sanderson, for life, and after her decease, he gave the house in which he then lived to his son George Sanderson and his heirs; but, if his said son should die without issue, then to his trustees in trust to sell, and to divide the proceeds equally amongst such of his children as should be then living and their issue; and he gave a house then in the occupation of his daughter Mary Swale, to her for life, and, after her

[Lees *v.* Sanderson.—4 Sim. 28.]

death, to his trustees, in trust, to sell and divide the proceeds equally amongst her children: and he gave two allotments of land to his trustees, in trust to sell them to his son-in-law J. H. Swale, at the price which he should put on the back of his will; but, if J. H. Swale should refuse to purchase them at that price, then in trust to sell them, in the usual manner, and to divide the money equally amongst the testator's surviving children and their issue: and he gave to his daughter Elizabeth Barker, the house in which she then lived, together with certain other hereditaments; and he directed that, after her decease, the rents of the last-mentioned premises should be equally divided amongst her surviving children, until the youngest attained twenty-one, and that then the same should be sold, and the money divided equally amongst her surviving children: and he directed that, after the death of his wife, all his real and personal estates in Aberford, which were not therein before disposed of, should be sold, giving the preference to his son William, to purchase the same at the valuation put upon the back of his will, and, if he refused, then to his son Thomas, on the like terms; and the testator directed that the money to arise from the sale of his real and personal estates in Aberford, and his second purchase in Liverpool, should be so divided as to make all his children, or their lawful issue, equal, whether in real estate, according to its value, or in money: and he directed, that if the plaintiff, his grandson Frederick Lees, the son of his late daughter Anne, should attain twenty-one, he should be paid the exact portion which would have been due to his daughter Anne, if she had been living; but, if the plaintiff should die before he came of age, then that his proportion of the testator's property should be divided amongst the testator's surviving children: and he gave the proportional part which would fall to his son Thomas to his four children, to be equally divided amongst them, when they attained twenty-one; and he directed that, if any of his children should be advanced, or be in his debt at his decease, such advancement or debt should stand as part of their portions: and he appointed the trustees his executors. On the back of the will was written the valuation referred to therein.

On the 6th of July, 1822, the testator, by a codicil, revoked the devise in favour of the children of his son Thomas, and gave the proportional share of his property thereby devised to them, to his son Thomas, absolutely.

In August, 1822, the testator died. One of the trustees and executors died in the testator's life-time, and the other refused to act; and letters of administration, with the will annexed, were granted to the testator's widow. On the 27th of January, 1823, she died intestate, and William Hardcastle became her administrator: and soon after her death the testator's three sons and two daughters (both of whom were married) took out letters of administration *de bonis non*, to the testator.

On the 7th of February, 1823, all the administrators, as well as the husbands of Mrs. Swale and Mrs. Barker being present, certain resolutions were entered into and signed, as follows:

"*Resolved*, 1st. That we appoint Messrs. Perfect, Smith & Co., Commercial Bank, Leeds, as bankers to the administrators, under the will of the late Mr. E. Sanderson, with instructions to enter the money already lodged in their hands, by the late Mr. E. Sanderson, and the executrix of the late Mr. E. Sanderson, as well as all future sums whatever, to the account of the said administrators.

"2d. That Mr. Holmes, or some other respectable auctioneer, be ap-

pointed to dispose of, by public sale, the household furniture, and other effects, without delay.

"3d. That the note of security given, by Mr. William Sanderson, for the valuation, be deposited in the bank in the names of the administrators, on account.

"4th. That Mr. William Sanderson's rent for the large house be calculated, for seven years past, at 40*l.* for the house, and 10*l.* for the land, without interest—this reduced rent to cover all improvements of land and premises, except the undermentioned fixtures, viz. grate in drawing-room, double boiler in back kitchen, lead cistern cased with wood, and pipes belonging, and verandah; the total rent, for the present half-year, ending Midsummer, 1823, to be 20*l.*

"5th. That the large house be offered for sale, first by private contract, the bargain only to be closed by the approbation of Mr. Thomas Sanderson.

"6th. The house, school and land, to be sold separately, as above, for the testator's estate.

"7th. That the new St. John's house be also offered for sale (if admissible with the tenor of the will) by private contract, the proceeds to be secured to the family, on mortgage, approved by Mr. George Sanderson, he receiving the interest for the term of his natural life.

"8th. That Mr. William Sanderson *be appointed acting administrator* in the absence of the others, and who shall keep regular accounts, balanced up once every six months; namely, at Christmas and Midsummer, and always open to the inspection of the parties.

"9th. That application be made, to some competent person, to value the land belonging to Mr. Swale's house, to enable us to judge of the price at which it may be offered to Mr. Swale.

"10th. That the writings of the several premises be given into the possession of the respective inheritors.

"11th. This resolution was erased.

"12th. That Frederick Lees' share shall be vested in good and sufficient mortgage, until he attain the age of twenty-one years, as approved by the administrators, the interest to be annually shared amongst the whole administrators.

"Thomas Sanderson,
"George Sanderson,
"William Sanderson,
"Mary Swale.
} *Joint Administrators.*

"Eliza objects to sign until she has taken a legal opinion on resolution 7th. If she does not sign with this resolution as it stands, it must be expunged, and the property remain unsold, for which fourteen days is given her to decide.

"7th February, 1823."

Letters, signed by all the administrators, were afterwards sent to several of the debtors to the testator's estate, requesting them to pay their debts to William Sanderson, "who has been appointed by us the acting administrator." Accordingly, William Sanderson, who, as the other administrators knew, was indebted to the testator, at his decease, alone got in the testator's outstanding estate, and the other administrators never interfered in the affairs thereof.

[Lees *v.* Sanderson.—4 Sim. 28.]

The bill was filed on the 10th of February, 1827, by Frederick Lees, an infant, stating, amongst other things, the purport of the letters beforementioned, and charging that the defendant, William Sanderson, was insolvent, and unable to pay what he had received on account of, or had become indebted to, the estate of the testator, and that the defendants, Thomas Sanderson, George Sanderson, Mary Swale, and Elizabeth Barber, or the defendants, John Henry Swale and James Bentley Barber, as the husbands of Mary Swale and Elizabeth Barber, ought to pay and make good the same; for that William Sanderson acted chiefly in the affairs of the testator, by the special direction and appointment of T. Sanderson, George Sanderson, J. H. Swale and Mary his wife, and J. B. Barber and Elizabeth his wife; and, as evidence thereof, that those defendants, or some of them, signed the resolutions before mentioned. The bill prayed that the will might be established and the trusts performed; that an account might be taken of the personal estate, and of the rents and profits of the real estates of the testator received by the defendants; that it might be declared that the defendants, Thomas Sanderson, George Sanderson, J. H. Swale and Mary his wife, and J. B. Barber and Elizabeth his wife, were responsible for what William Sanderson had received or become indebted to the estate of the testator, and that they might be decreed to make good the same.

William Sanderson was in custody for not paying, into court, certain sums, which appeared by his answer to be due from him to the testator's estate, and which he had been directed to pay by an order made, in the cause, in March, 1828; and he did not appear at the hearing of the cause.

Sir E. Sugden and Mr. Barber for the plaintiff:

Immediately on the letters of administration being taken out to the testator, all the co-administrators (except Barber and wife) signed the resolutions, by which they authorized William Sanderson (who was then indebted to the estate) to act as sole administrator: and they never took any steps to see that he performed his duty. Though Mrs. Barber did not sign the resolutions, yet she acquiesced in the arrangement; and she, as well as the other administrators, signed the letters that were sent to the creditors of the testator. All those who, either expressly, or by acquiescence, devolved the duty on William Sanderson, are answerable for what he did.

[The Vice-Chancellor:—Was not the signing of the resolutions by Mrs. Swale a mere nullity, she being a married woman?]

Both Mr. Barber and Mr. Swale were present when the resolutions were signed. The sending of the letters to the creditors was an adoption of the resolutions, by the husbands. They do not say, in their answers, that they repudiated the acts of their wives, but that William Sanderson acted as sole administrator, in pursuance of the resolutions.* These administrators were trustees for the plaintiff, who is an infant, and were bound to have his share of the property laid out and secured for his benefit, and they are answerable if they suffer it to remain in the hands of their co-administrators. These defendants had no right to suffer the debts

* *Quære*, if the husband of an administratrix is not answerable for the acts or defaults of his wife, even where there are no special circumstances in the case.

which were due from William Sanderson to the testator's estate, to remain unpaid, or the testator's property to continue in his hands. The letters of administration were taken out in 1823, and nothing has been done since; but property to a large amount has been suffered to remain in the hands of William Sanderson. Whether those resolutions were signed or not, it was the duty of these parties to call William Sanderson to account. No one can dispute that Mr. and Mrs. Barber, and Mr. and Mrs. Swale, are liable; for they, as well as the other administrators, sanctioned the property remaining in the possession of William Sanderson. Gill *v.* The Attorney-General, Hard. 314; Sadler *v.* Hobbs, 2 Bro. C. C. 114; Chambers *v.* Minchin, 7 Ves. 186; Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves. 252.

Mr. Knight and Mr. Duckworth for the defendants, George Sanderson, and Barber and wife:

Mr. and Mrs. Barber swear, in their answer, that they did not either sign or approve of the resolutions. Besides, those resolutions did not give William Sanderson any greater power, over the testator's personal estate, than he would have had if they had not been entered into. It ought to be proved that our clients gave William Sanderson an authority, that he has acted under it, and received what he could not have done without it: until that is done, they cannot be made liable for his acts or defaults.

Mr. William Lowndes appeared for the defendants, Swale and wife, Mr. Rose for the assignees of Thomas Sanderson, who had become bankrupt, and Mr. Farrer for the personal representative of Elizabeth Sanderson, the testator's widow.

The Vice-Chancellor:—By the resolutions, the co-administrators abandoned, to William Sanderson, all dominion over the personal estate; but there was not that general agency given to him as to the real estates; and, therefore, I cannot charge his administrators as to his receipts of the rents and profits of the real estate, though I can do so as to his receipts of the personal estate.

"Declare that Thomas Sanderson, William Sanderson, George Sanderson, J. H. Swale and Mary his wife, J. B. Barber and Elizabeth his wife, are responsible and liable to answer and pay what shall be found due from the said defendant, William Sanderson, on account of the personal estate of the testator, received by the said William Sanderson, and also the sum of 397*l.* 10*s.* 3*d.*, the value of the farming stock possessed by William Sanderson in the manner in the pleadings mentioned. And order, that what, on taking the said accounts, shall be found due from the said defendants, J. H. Swale and Mary his wife, and J. B. Barber and Elizabeth his wife, be answered by the said J. H. Swale and J. B. Barber personally."

Johnson *v.* Compton.

4 *Simons*, 37.

An annuity granted by A. to B. was secured by a covenent by C., a surety, to pay the annuity in case A. made default, and by a judgment for 2100*l.* entered up against A. and C. The annuity remained unpaid from January, 1823, A. having left the country, and in February, 1824, C. became bankrupt, and afterwards obtained his certificate. C. having died, B. filed a bill to have the arrears of the annuity paid out of his real and personal estates: held that neither the value of the annuity nor the sum due on the judgment was provable under C.'s commission, and, therefore, that his certificate was not a bar to the plaintiff's demand.

What is sufficient *primâ facie* evidence that a defendant is out of the jurisdiction.

The court will not decree a specialty debt to be paid out of the deceased's real estates, unless the creditor sues on behalf of himself and all other the specialty creditors: but leave will be given to amend the bill at the hearing.

November 25; December 23, 1830. January 1, 1831.

BY an indenture of the 4th of July, 1821, and made between Charles Struth, of the first part, Peter Alfred Compton, of the second part, and the plaintiff, of the third part, Struth, in consideration of 1050*l.* paid to him by the plaintiff, granted, to the plaintiff, an annuity of 150*l.* during the life of Struth, to be paid by four equal quarterly payments, on the 4th of October, the 4th of January, the 4th of April, and the 4th of July, together with a proportionable part up to the day of the decease of Struth; and, after reciting that it was agreed, on the treaty for the purchase of the annuity, between the parties to the indenture, that Compton should enter into the covenant hereinafter stated, for better securing the payment of the annuity, together with any additional premium or premiums of insurance, which, if any, should be occasioned by reason of Struth going into parts beyond the seas or otherwise, as therein mentioned, it was further witnessed that, in pursuance of the said agreement, Compton did thereby, for himself, his heirs, executors and administrators, covenant, with the plaintiff, that, in case Struth, his heirs, executors or administrators should not pay the annuity to the plaintiff, and such proportionable part thereof up to the day of the decease of Struth, on the days, and in the manner before mentioned, or in case Struth, his heirs, executors or administrators should not pay all such additional premium or premiums of insurance that should be incurred by reason of Struth so going into parts beyond the seas or otherwise, then Compton, his heirs, executors or administrators should, from time to time, and at all times thereafter, during the life of Struth, from and immediately after default should be made as aforesaid, and without any demand made upon or notice given to him or them thereof, pay the annuity to the plaintiff, and all arrears thereof, and such proportionable part thereof as aforesaid, and all such additional premiums of insurance as should be incurred as aforesaid: and the indenture contained a proviso for the repurchase of the annuity, by Struth and Compton, or either of them, upon the terms therein mentioned.

[Johnson *v.* Compton.—4 Sim. 37.]

A warrant of attorney to enter up judgment, was, at the same time, executed by Struth and Compton, for 2100*l.*; and judgment was, soon afterwards, entered up against them in the Court of King's Bench. Struth paid the annuity to the plaintiff, for a short time after the grant of the annuity; but, in 1823, he left this kingdom, and had ever since remained abroad; and no payment had been made, to the plaintiff, in respect of the annuity, since the quarterly payment which became due on the 4th of January, 1823.

Compton, by his will, dated the 16th of July, 1824, devised and bequeathed, unto William Norris, Joseph Baker and Orton Smith, all his real and personal property, upon trust to sell and dispose of the same as therein mentioned, and to place out the proceeds at interest, upon certain trusts, for the benefit of his wife, Amelia Compton, and all his children who should be living at his decease; and the testator appointed his wife, and Norris, Baker and Smith, executors of his will.

The testator, by a codicil, bearing date the 13th of January, 1827, revoked the devise to Norris, Baker and Smith, and the appointment of them as executors of his will; and, in lieu thereof, gave to Henry Earle, Joseph Baker, Thomas Bruin the younger, and John Smith, all his real and personal property upon the same trusts as in his will mentioned, and appointed them and his wife executors and executrix of his will.

Compton died soon after the date of the codicil, and shortly after his death, his widow and Thomas Bruin the younger, and John Smith proved his will and codicil, and possessed his personal estate, and entered into the possession of his real estates.

The bill (which was filed in February, 1828) prayed that an account might be taken of the arrears of the annuity, and of all sums of money which were or might be due, to the plaintiff, in respect thereof; and that an account might be taken of the personal estate of the testator possessed by the defendants, his executors, and that they might be decreed thereout to pay, to the plaintiff, what should be found due to him, and, in case the personal estate should not be sufficient for that purpose, then that the deficiency might be made good by the sale of a sufficient part of the testator's real estates.

The defendants to the bill were the executors and trustees, and the children of the testator; and they, in their answer, said that in February, 1824, a commission of bankrupt was issued against the testator, who was duly found and declared a bankrupt, at which time the annuity was, and had been, for a length of time, in arrear; that they had heard and believed that the plaintiff never proved, or attempted to prove, either the arrears, or the value of the annuity, under the commission, as he might and ought to have done: that the testator duly obtained his certificate under the commission, and that the same was allowed, by the Lord Chancellor, on the 18th of May, 1824; and they submitted that the commission and certificate were a bar to all the claims made by the bill, and all the relief thereby sought against the defendants; and they claimed the same benefit of the commission and certificate, as if they had pleaded the same, in bar of the relief sought by the bill.

Mr. Pepys and Mr. Parker for the plaintiff:

The question is whether this annuity could have been proved under the commission issued against the grantor? If it was not provable under the commission, then the plaintiff's demand is not barred by the certifi-

[Johnson *v.* Compton.—4 Sim. 37.]

cate.* This question has been the subject of decision: Hoffham *v.* Foudrinier, 5 M. & S. 21; Watkins *v.* Flannagan, 13 Pri. 24; Browne *v.* Lee, 6 B. & C. 689. In the last of these cases, Bayley, J. says: "The statute 49 Geo. 3. c. 121, s. 17, enacts, &c. That clause applies to annuity creditors only. Was the plaintiff an annuity creditor of the defendant? I think he clearly was not. Hey, the grantee of the annuity, was not an annuity creditor of the defendant, who was only liable in case the grantor made default: besides, how could a value be put on the plaintiff's interest in this annuity? The value of an annuity for life is estimated by considering it as an annuity for that number of years which is the

* By 49 Geo. 3. c. 121, s. 8, it is enacted, "That, in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors who have not proved can receive a dividend equally, in proportion to their respective debts, without disturbing any dividend already made, and in all cases of commissions of bankrupt hereafter to be issued, where, at the time of issuing the commission, any person shall be surety for, or be liable for any debt of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and, when the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable, to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt: provided that such person had not, at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment: provided always that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice; and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands at the suit of every such person having so paid, on being hereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt in respect of such suretyship or liability, in like manner to all intents and purposes, as if such person had been a creditor, before the bankruptcy of the bankrupt, for the whole of the debt in respect of which he was surety or was so liable as aforesaid."

By section 17, it is enacted, "That it shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue after the passing of this act, whether the same shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured, and whether there shall or shall not be, or have been, any arrears of such annuity at or before the time of the bankruptcy, to prove, under such commission, as a creditor for the value of such annuity, which value the commissioners shall have power, and are hereby required to ascertain, and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved, under the commission."

probable duration of the life for which it is granted: that is the value of the interest of the grantee. But how is the value of the interest of a surety to be calculated? He never will be liable if his principal does his duty, and may, perhaps, never be called upon to pay anything. It seems to me that this is not a case in which the plaintiff could prove the value of his annuity, as a debt under the commission." The obligation of the surety is one which either may or may not arise; it does not create a contingent debt; and it is not provided for by the 49 Geo. 3. c. 121. The arrears of the annuity which were due when Compton became bankrupt, were provable under his commission; and the plaintiff does not ask for them; but the plaintiff is entitled to be paid the arrears that have become due since the bankruptcy.

Sir Edward Sugden and Mr. Wakefield for the defendants:

Brown *v.* Lee was a case between co-sureties; and, in Watkins *v.* Flannagan, the surety was endeavouring to prove against the estate of his principal. The question in this cause does not depend upon the 49 Geo. 3. c. 121, but upon 6 Geo. 4. c. 16.*

* By section 54, it is enacted, "That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

By section 55, it is enacted, "That it shall not be lawful for any person entitled to any annuity, granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be said* for the accruing payments of such annuity until after annuitant shall have paid* or satisfied the amount so proved, with interest thereon at the rate of four per cent per annum from the time of notice of such proof, and of the amount thereof being given to such surety, and after such payment or satisfaction such surety shall stand in the place of such annuitant, in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety, in respect of such annuity; provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

By section 56, it is enacted, "That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have hap-

* *Sic.*

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(The Vice-Chancellor:—That act was passed after the bankruptcy.)

It was; but it has a retrospective effect. Bell *v.* Bilton, 4 Bingh. 615. The 54th section of that act says, generally, "any annuity creditor." Can it be said, that the grantee was not an annuity creditor of Compton? Compton was a party who had granted the annuity. Though he was a surety, he was an annuity debtor to the grantee: and, if he was an annuity debtor to the grantee, the grantee was an annuity creditor of his. The legislature took it for granted, that the case of a surety was provided for by the 54th section; and then, by the 55th section, it is enacted that, if the annuitant do not prove under the commission, he shall not proceed against the surety. But for the provisions of this section, the surety would have been placed in a worse situation than the bankrupt principal. However, if there is any doubt as to whether this case falls within the 54th and 55th sections, then it is provable, as a contingent debt, under the 56th section.

But it is not necessary for us to discuss the meaning of that act, as there is a specialty in this case. The judgment was a provable debt against Compton's estate. From the moment that the judgment was entered up, the sum recoverable under it became the fund for payment of the annuity; and the security for the annuity was the judgment, and not the covenant. That sum was an immediate debt, and was provable under the commission; and, on that ground alone, there is an end to the plaintiff's case.

Mr. Pepys, in reply:

At the time of the bankruptcy, the debt due under the judgment was not the whole sum for which the judgment was entered up, but only the arrears that were due at the time of the bankruptcy. When the obligation to pay arises on the deed, then, and not before, there is a debt to be proved. The 54th section of 6 Geo. 4. c. 16, is in substance the same as the 17th section of 46 Geo. 3. c. 121. And the 55th and 56th sections of the former act are totally inapplicable to the present question. The former of those sections merely enacts that, if the grantor becomes bankrupt, the surety shall not be liable, unless the grantee gives him an opportunity of proving under the commission. Here it is not the grantor, but the surety, that has become bankrupt. The commission issued in 1824, and the 49 Geo. 3. c. 121, is the only act that is in question in this cause.

The Vice-Chancellor:—The judgment must be taken with reference to the sum intended to be secured by it. In this case, Compton did not covenant to pay the annuity, in all events, but only when the grantor made default: he, therefore, never undertook to pay the whole sum, and, consequently, his estate cannot be liable to that extent. This case does not fall within the 6 Geo. 4. c. 16, and the amount alleged to be due could not have been proved under 49 Geo. 3. c. 131, s. 17; for Compton cannot, for the reasons which I have before adverted to, be considered as an annuity creditor of the plaintiff.

Decree according to the prayer.

pened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

[Johnson *v.* Compton.—4 Sim. 37.]

In this cause, one of the witnesses who was examined for the plaintiff, in order to show that Struth was out of the jurisdiction of the court, deposed that he had read some letters, dated from Paris, and addressed to and received by the plaintiff, (one of which he had seen within a week past,) stating that Struth was then in Paris, and that on that ground he believed that Struth was not resident in England. Another witness said, that the defendant Amelia Compton had told him, about five days since, that she had heard and believed that Struth was then at Paris. A third witness deposed that, about two months before his examination, he had seen Struth in Paris, where he then resided; that he had not heard that Struth had since left Paris; and that if he had, the witness believed that he should have heard of it, and under those circumstances the witness believed and had no doubt that Struth then resided in Paris, and that the difficulties he got into in this country had prevented his returning; that, to the best of the witnesses's recollection, Struth went to reside abroad about 1822 or 1823; and that, save as aforesaid, the witness had had no intercourse or correspondence with him since 1823.

The counsel, for the defendant, objected that this evidence was not sufficient to prove that Struth was then out of the jurisdiction. But the Vice-Chancellor said, that it was evidence, *primâ facie*, that Struth was abroad.

The registrar having declined to draw up the decree, so as to effect the real estates of Compton, on the ground that the bill was filed by the plaintiff simply, and not on behalf of himself, and all other the specialty creditors of Compton, the plaintiff's counsel applied that the decree might be drawn up, so as to include the real as well as the personal estate; but the Vice-Chancellor thought that the registrar's objection was well founded, and refused the application. On a subsequent day, his Honour was furnished with a note of a case from Reg. Lib. of Sadler *v.* Richards, 31st May, 1785, in which Lord Thurlow, upon the point being mentioned to him, had decided that the decree in a suit by a specialty creditor alone, ought to be confined to the personal estate of the debtor; but his lordship gave leave to the plaintiff to amend his bill, by making it a bill on behalf of himself and all other the specialty creditors: and, on the authority of that decision, the Vice-Chancellor allowed the plaintiff in this cause to make a similar amendment in his bill.

Bulmer *v.* Jay.

4 *Simons*, 48.

The ultimate trust declared in a settlement of a sum to be raised out of the husband's estate, was for the executors or administrators of the wife, who afterwards died in her husband's lifetime: Held, that the next of kin of the wife were entitled to the money, such appearing, from the provision of the settlement, to have been the intention of the parties.

November 27, 1830.

BY indentures of lease and release, of the 20th and 21st of September, 1798, the release made between Richard Carwardine of the first part, Ann Prichard, spinster, of the second part, and Benjamin Prichard and Lewis Chambers of the third part, being the settlement on the marriage of Richard Carwardine with Ann Prichard, in consideration of the marriage, and of the fortune of Ann Prichard, consisting of 1000*l.* stock, and other personal property to which Carwardine would become entitled on the marriage taking effect, Carwardine, by the direction of Ann Prichard, conveyed unto and to the use of Benjamin Prichard and Lewis Chambers and their heirs, a messuage in the city of Hereford, then in the occupation of Carwardine, in trust, after the solemnization of the marriage, for Carwardine for his life, and, after his decease, upon trust for Ann Prichard for her life, and, after the decease of the survivor, in trust for the children of the marriage, as Carwardine and Ann Prichard should appoint, and, in default of any such appointment, in trust for all the children of the marriage, as tenants in common, in fee; and, in case there should not be any child of the marriage, then upon trust, as soon as conveniently might be after the expiration of twelve calendar months from the decease of the survivor of Richard Carwardine and Ann Prichard, by sale or mortgage of the premises, to raise the sum of 750*l.*, and to pay the same unto such person or persons, as Ann Prichard, notwithstanding her coverture, should, as therein mentioned, appoint, and, in default of such appointment, upon trust to pay the 750*l.* or such part thereof as might be unappointed, unto the executors or administrators of Ann Prichard: provided that, if the person or persons who should, upon the death of the survivor of Richard Carwardine and Ann Prichard, become entitled to the freehold and inheritance of the premises, subject to the said sum of 750*l.*, should, prior to the expiration of the said twelve calendar months, pay the 750*l.* to the trustees, then the trustees should convey the premises unto the person or persons so entitled to the freehold and inheritance thereof, and his, her or their heirs and assigns; and Richard Carwardine covenanted with the trustees, that, if the money to arise by sale of the premises should not be sufficient to discharge the whole of the 750*l.*, then all the estate and effects whereof he should be seised or possessed, or whereunto he should be entitled, at his decease, should be and remain subject to the payment of such sum or sums of money as, together with the money to arise by such sale as aforesaid, should be sufficient to discharge the whole of the 750*l.*; and that neither

his estate and effects, nor his heirs, executors or administrators should be exonerated or discharged, until the 750*l.* should be fully paid off.

Mrs. Carwardine died, in 1809, intestate and without having had any issue, and without having made any appointment of the 750*l.* Mr. Carwardine died in March 1819, having, in 1817, sold and conveyed the messuage comprised in the settlement, to the plaintiff, and covenanted for the title thereof, and that the same was free from incumbrances, in the usual manner.

The bill was filed, by the purchaser, against Jay and J. Griffiths, who were Mr. Carwardine's executors, and also the administrators of his wife; Edward Chambers, the heir of the surviving trustee of the settlement, and some of the next of kin of Mrs. Carwardine. It alleged that the defendants, Jay and Griffiths, as the personal representatives of Mr. and Mrs. Carwardine, claimed to have the 750*l.* raised and paid to them, and that, availing themselves of the legal estate being outstanding, they had caused an ejectment to be brought, against the plaintiff, by Chambers's heir, to recover possession of the purchased premises. The bill charged that Carwardine, by having survived his wife, became entitled to her personal estate; that, if the 750*l.* were raised and paid to Jay and Griffiths, they would hold the same as part of Carwardine's personal estate, and that the same would be liable, in their hands, to make good, to the plaintiff, the 750*l.* under the the covenants in his purchase-deed; and that, therefore, the 750*l.* was extinguished. The bill prayed that it might be declared that the plaintiff was entitled to have the legal estate conveyed to him, free from incumbrances, and that Jay and Griffiths might be decreed to join, with the defendant Chambers, in such conveyance, or otherwise to release the plaintiff from the charge of 750*l.*; that, if necessary, an account might be taken of Carwardine's personal estate; and that the defendants might be restrained from proceeding with the ejectment.

Mr. Knight and Mr. Wheatley, for the plaintiff, said that the question was, as to the meaning of the expression, the executors or administrators of the wife; that those words had never been held to mean the next of kin of the wife, but must be taken according to their ordinary and proper meaning; in which case they being, in this case, the executors of the husband, would be the persons who were bound to perform the covenants in the conveyance to the plaintiff.

Mr. Tamlyn, for the defendants, the executors of Mr. Carwardine, referred to Squib *v.* Wyn, 1 P. W. 378, and Mr. Butler's note on Co. Litt. 351, a.

Mr. Wakefield appeared for the defendant Chambers, and Sir Edward Sugden and Mr. E. Hughes for the next of kin of Mrs. Carwardine.

But the Vice-Chancellor, without hearing them, said that the question was whether the words "executors or administrators of Ann Prichard," in the settlement, were to be construed so as to give the husband a right to have the 750*l.* raised out of his own estate: that that was not the meaning of the parties; but that they intended to give the wife something beneficial to be raised out of the husband's estate; and consequently that the wife's next of kin, and not the husband's representatives, must be held to be entitled to the 750*l.*

December 19, 1832.—This cause now came on to be re-heard.

[Bulmer *v.* Jay.—4 Sim. 48.]

Mr. Pepys and Mr. Wheatley, for the plaintiff, said that it was unnecessary for them to offer any arguments to the court, as the question in the cause was to be discussed by the personal representatives of Mr. Carwardine, and by the next of kin of Mrs. Carwardine.

Sir E. Sugden and Mr. E. Hughes, for the next of kin of Mrs. Carwardine:

The trusts of the settlement, and especially the proviso at the end of it, show clearly that it was the intention of the parties that neither the husband nor his estate should take the 750*l.* The inheritance of the settled estate, was taken out of the husband, and dedicated to the purposes of the settlement. The sum was not to be raised until twelve months after the death of the survivor of the husband and wife; and it was then to be paid to the persons who should then be the executors or administrators of the wife. This shows, clearly, that the husband was to be excluded; and the point is placed beyond all dispute by the proviso, which renders his estate liable to pay the charge, in all events. Bailey *v.* Wright, 18 Ves. 49; Watt *v.* Watt, 3 Ves. 244.

Mr. Knight and Mr. Stinton for the executors of Mr. Carwardine:

The words "executors or administrators" have never been held to mean next of kin. Bailey *v.* Wright is merely an authority that, under a limitation to the next of kin of the wife, the husband is not entitled. There the trust was for next of kin or personal representatives, which showed that the parties meant, by personal representatives, the next of kin. The question is, what was meant, by the parties, at the time of executing the deed. It cannot be held that the property is to be applied in one way if the husband survives, and, in another, if the wife survives. Anderson *v.* Dawson, 15 Ves. 532; Collier *v.* Squire, 3 Russ. 467; Saberton *v.* Skeels, 1 Russ. & Myl. 587; Wellman *v.* Bowring, 3 Sim. Rep. 328.

Mr. Wakefield, for the defendant Chambers.

The Vice-Chancellor:—I apprehended that, in putting a construction on the expression, "the executors or administrators of Ann Prichard," I ought not to look at those words only, but at the whole of the settlement, in order to discover what the intention of the parties was in using that expression: for, to adopt the language of Lord Thurlow in Woodcock *v.* The Duke of Dorset, 3 Bro. C. C. 569, the intention of the settlement is the truth and honour of the case. These parties could not have intended that the words, "executors or administrators," should here be taken in their literal sense, but they must have meant to express by them, such persons as would be entitled to Mrs. Carwardine's personal estate, in case she died intestate. I do not mean to say that, "executors or administrators" mean, in all cases, next of kin; but that that is the only construction that ought to be put on those words in this settlement: for no one, on looking at the whole of this settlement, can put a different construction on them. It appears by the recitals, that the husband became the purchaser of all his wife's choses in action; and then the husband's property was settled upon the following trusts; [his Honour here read the trusts of the settlement and the proviso]. Now it is clear,

from this proviso, that the parties considered that the 750*l.* would, in all events, be raiseable out of the husband's estate; and how could that be the case, if the husband was to become entitled to it?

I decide not on the literal construction of the words, but on the truth and honour of the settlement.

Greenwood *v.* Atkinson.

4 *Simons*, 54.

The defendant, an attorney, moved for leave to file a supplemental answer to deny admissions in his answer that went to establish the plaintiff's case, on the ground of having, on examining his books, discovered that the admission ought not to have been made. Motion refused.

December 9, 14, 1830.

IN December, 1814, the plaintiff and Christopher Bolland, deceased, having in their hands the sum of 1000*l.* as trustees of the settlement on the marriage of William T. Lee, which they were directed to lay out at interest on good security, employed the defendant and the same Christopher Bolland, (who were then in partnership together as attorneys and solicitors), to act as their attorneys and solicitors in investing that sum: and accordingly the defendant and Bolland lent and advanced the 1000*l.* to W. T. Lee, who, by an indenture of the 31st December, 1814, which was prepared by Bolland, mortgaged a leasehold estate in the west riding of Yorkshire, to the plaintiff and Bolland, for securing the 1000*l.* and interest; but no memorial of this deed was registered until 1829. In the meantime, Lee, who had got possession of the mortgage-deed, mortgaged the estate to three other persons in succession, (whose securities, by being duly registered, gained priority over the first mortgage,) for sums, which together amounted to the full value of the estate. In 1828 Lee became bankrupt, and left the country, and his estate was wholly insolvent.

The bill, which was filed in June, 1830, alleged that, by the means aforesaid, the security of the 31st December, 1814, was wholly lost to the plaintiff and Bolland, and that the subsequent mortgages had priority over it, owing to the negligence of the defendant and Bolland, as such solicitors and attorneys as aforesaid, in not having caused a memorial of the security to be registered in due time; that Bolland died in June, 1829; that the defendant, having survived Bolland, his co-partner, was answerable to the plaintiff for the loss; but that, as Bolland was jointly interested with the plaintiff, in the 1000*l.*, and was also in partnership with the defendant during the time of the transaction, the plaintiff could not proceed against the defendant, as such surviving partner, in a court of law. The bill, after charging that the defendant had in his possession papers and writings relating to the matters aforesaid, prayed that the defendant might be decreed to pay, to the plaintiff, the 1000*l.*, with interest.

The defendant, in his answer, which was filed in October, 1830, stated

[Greenwood *v.* Atkinson.—4 Sim. 54.]

that the mortgage for securing the 1000*l.* was prepared, and the business of the loan transacted, by Bolland alone, and that Bolland made out the bill for preparing the deed, to Lee, in the name of the partnership, and that the amount was received, from Lee, for the use of the partnership, and that the draft of the mortgage-deed of December, 1814, and of the bill of costs for preparing it, were then in the defendant's possession.

The defendant now moved that he might be at liberty to file a supplemental answer, in order to correct the above statements, by stating that Bolland did not make out, to Lee, a bill of costs for preparing the mortgage, in the name of the partnership, and that no bill of costs for preparing such mortgage, or in relation thereto, was ever paid to, or received by, or for the use of the partnership, from Lee, or any other person or persons, and that Bolland prepared the mortgage gratuitously, and that neither the partnership nor the defendant, personally, nor Bolland, was ever paid for preparing such mortgage; and by stating that no drafts of any bill or bills of costs for preparing the mortgage was or were in the defendant's possession, and by putting directly in issue, that the defendant was never engaged, as solicitor, with respect to the mortgage.

An affidavit to the following effect was made, by the defendant, in support of the motion:—That, since putting in his answer, he had discovered that the partnership were not paid by Lee, or any other person, for preparing the mortgage of the 31st December, 1814, and that no bill of costs for preparing such mortgage was, as he believed, made out by Bolland, or any other person, to Lee, or any other person, in the names of the partnership, and that the defendant had not in his possession or power any drafts of the bills of costs, for preparing the mortgage of the 31st of December, 1814, except that there were, in the day-books belonging to the partnership, the original minutes made of the charges for preparing the marriage articles and settlement of W. T. Lee, under date of the respective times when they were prepared, which minutes were also transcribed and embodied in the general bill of charges, by the partnership, against Lee; but that, neither in the day-books nor in the ledger, nor in any other book of the partnership, was there, or had there ever been, any minute or memorandum of the costs of preparing the mortgage-deed, or of any business or matter relating thereto: that the deponent believed that Bolland prepared the mortgage of 31st December, 1814, gratuitously, for that, in consequence of a notice of motion in this cause, to leave, with his clerk in court, the drafts of deeds and bills of costs admitted by the deponent's answer to be in his possession or power, he was induced to examine the books and papers of the late partnership between himself and Bolland, when he discovered that there was not contained, in any of the books of the late partnership, any bill of costs for preparing the mortgage, and that there was not to be found any draft of any bill of costs for preparing the mortgage, or any entry of any sum of money received by the deponent and Bolland, or either of them, for preparing the same; and that the deponent was altogether mistaken in stating, in his answer, that he had in his possession the draft of the bill of costs for preparing the mortgage, for that he had made diligent search for, but had been unable to find, any such draft or bill of costs: that, when he put in his answer, he was induced to believe that such bill of costs had been made out, in the name of the late partnership of Atkinson & Bolland, and that the same was in his possession, by reason of his having found the draft of the mortgage, bearing the name or firm of Atkinson &

Bolland at the foot thereof, among the papers of the year 1814, belonging to the partnership, and that, therefore, he took it for granted that the preparing of such mortgage was charged for and paid, to the partnership, accordingly, but which he had found and believed not to have been the case: that there was no mention or trace of the business of the mortgage in any of the books belonging to the partnership, and that the whole of the charges of the partnership against Lee, for business done for seven years, commencing in 1811, was contained in the ledger belonging to the partnership, but that, in such ledger, nothing was charged, or even said of the mortgage: that the deponent never received any sum of money, and, as he believed, the late partnership, or Bolland, personally, never was paid anything for preparing the mortgage: that Bolland, being one of the trustees of the property lent upon the mortgage, and also a solicitor, the business relating to the mortgage was wholly transacted by him, without any interference on the part of the deponent.

In opposition to the motion, an affidavit was made, by the plaintiff, the substance of which was that the mortgage-deed was prepared by Bolland, or under his direction and that of his partner, in their usual way of business, and that the plaintiff had no reason to believe that Bolland prepared the deed gratuitously, or that the costs of preparing it were paid out of the trust-moneys: but the deponent admitted that he never paid for the mortgage, it being, as the deponent believed, the custom for borrowers of money on mortgage to pay the charges attending the same.

Mr. Peyps and Mr. Barber for the defendant, in support of the motion:

This is a case in which the court can have no difficulty in allowing the defendant to state the facts correctly; for the partnership books are accessible to the plaintiff, and, by inspecting them, he can discover whether they do or do not contain any entry relative to the mortgage. The only ground for coming into this court, is the union, in Bolland, of the character of trustee with that of solicitor. If the defendant had pleaded wrong at law, he might have amended his plea by taking out a summons. If the explanation given by the defendant is satisfactory, this court will not allow him to be deprived of his defence, by the admissions which he has incautiously made. The mistake is sufficiently accounted for by his having seen the names of Bolland & Atkinson at the bottom of the draft. Jennings *v.* Merton College, 8 Ves. 79. In Curling v. Marquis Townshend, 19 Ves. 628, the motion was refused, because the facts, if put upon the record, would not have materially altered what the court would have done in a case of that kind: but here, if the motion is refused, a material injury will be done to the defendant.

Mr. Knight and Mr. G. Richards, for the plaintiff, in opposition to the motion:

The bill was filed in June, and the answer was not put in till October; the defendant, therefore, had sufficient time to investigate the matter. Besides, the defendant was an experienced solicitor, and had no occasion to resort to any other advice, and his answer is the answer of a man acting professionally in his own business. How could the finding of a draft of a mortgage-deed lead a solicitor to conclude that the bill for it had been paid? The statements in the bill, which the defendant admitted in

[Greenwood *v.* Atkinson.—4 Sim. 54.]

his answer, and which he now seeks to deny, relate to the only points which are in issue in the cause. The question on which the whole cause turns, is, whether Bolland & Atkinson were employed as the solicitors of Greenwood & Bolland. He now seeks to deny, what he had admitted before. We have the authority of Lord Eldon for saying that applications of this nature are to be watched with great jealousy, and that they ought not to be granted in a case where a defendant has been guilty of negligence. See 19 Ves. 632. The defendant, in the first instance, swore that particular papers were in his possession, and now he says that he had looked and found that no such papers are in his possession. There is no case in which the court will allow a defendant to put in a supplemental answer, for the purpose of varying his defence: that indulgence is granted only when the object is to explain a statement in the answer. Foster *v.* Foster, 2 Bro. C. C. 616.

Mr. Pepys, in reply:

In Wells *v.* Wood, 10 Ves. 401, all that Lord Eldon says, is that a defendant, who applies for leave to file a supplemental answer, ought to file an affidavit, stating that, at the time of putting in his answer, he did not know the circumstances upon which he makes the application, or any other circumstances upon which he ought to have stated the fact otherwise. There is no possibility of the case miscarrying for want of the admissions in the answer: for the proof of the facts does not depend upon the defendant's admissions. The transaction, if a partnership one, will be found in the books; and it will appear, from them, whether the bills were made out or not.

The Vice-Chancellor:—Before I decide this motion, I should like to see how the matter stands upon the pleadings.

December 14, 1830.—On this day, his Honour, after stating the material passages in the bill and answer, and the defendant's affidavit, delivered judgment as follows:

The question, upon this motion, is, whether the defendant, Atkinson, ought to be permitted to file a supplemental answer for the purpose of stating facts, which are directly at variance with the statements in the answer on the record. Several cases are reported upon applications to file supplemental answers: that point came before Lord Eldon in Jennings *v.* Merton College. There a mistake had been made, by the defendants, in admitting some letters to be in their possession which they had not, and in omitting others which they had. It does not appear that there was much discussion in that case, or that the defendants proposed to alter the substance of their answer: and, probably, it was quite immaterial whether the documents were in their possession or not. In Wells *v.* Wood, the defendant had, by his first answer, denied a fact which he was afterwards satisfied he ought to have admitted; and he only desired, by the supplemental answer, to make a more favourable case for the plaintiff. But Lord Eldon refused the motion, on the ground that the affidavit was insufficient. In Livesey *v.* Wilson, 1 V. & B. 149. The defendant had stated, in his answer, that he took possession, of the purchased property, subsequently to the contract being entered into; and he

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applied for liberty to file a supplemental answer, for the purpose of stating that he took possession of part only of the purchased premises, under the articles of agreement, and that he was in possession of the other part at the date of the contract, as tenant. It is observable that what he wished to state tended to make the case less beneficial to the plaintiff; and Lord Eldon says: "The fact now desired to be introduced, may amount to the most material fact in the cause: the whole case may turn upon it; it is not the mistake of a fact. I am unwilling to make such a precedent; and consider this motion as of such importance that I will not grant it, unless the defendant will tell me, on his oath, that, when he swore to his original answer, he meant to swear in the sense which he now desires to be at liberty to swear to:" and the motion was refused. In Strange *v.* Collins, 2 V. & B. 163, the bill claimed, a legacy, against the defendant, as administrator of John Collins, the executor of the testator, by whose will the legacy was bequeathed. The defendant, by his answer, denied that he had obtained letters of administration to his father, or that he was his personal representative, or had possessed his personal estate. The object for which the defendant moved to put in a further answer, was to state that letters of administration to his father's effects, were granted to him in 1797. It is observable that the defendant there proposed to state a fact which went to establish the plaintiff's case, and there could be no doubt about the truth of the statement, as it might be verified by production of the document. In Edwards *v.* Macleay, 2 V. & B. 256, the defendant, in his answer, denied that he had any recollection of an entry in the committee book of a parish, and he applied for leave to file a supplemental answer for the purpose of correcting that allegation; and he swore that, at the time of filing his answer, he had no recollection of the entry, or of his having been present when it was made, but had since discovered the fact to be so. In that case, there could not be any doubt of the truth of the proposed statement, and it went to support the plaintiff's case; and accordingly, the motion was granted. Then follows the case of Curling *v.* Marquis Townshend, 19 Ves. 628. There an answer had been put in which contained an admission of the plaintiff's case, which the defendant stated he was induced to make, by the misrepresentation of the plaintiff, and by papers having been withheld from him, by which he could have contradicted the statements of the bill, and that circumstances have since come to his knowledge which, if he had known, he would not have put in his answer to that effect: and the object of the defendant was to withdraw the admission which he had made of the plaintiff's case. Lord Eldon, in his judgment, says: "It would be very difficult, even upon negligence, unless the party was led into it, to have the records of the court altered; and I dare not, in such a case, (let it be in fact what it may,) lay down a principle that would form a precedent for permitting an answer, after the lapse of two years, to be altered, in effect, from one end to the other."

Now it is true that, in the present case, the answer has been filed a few months only: but I consider that the general effect of granting this motion would be to establish a precedent, which would be exceedingly mischievous; especially as the bill is filed against an attorney, and states a case which must have put him on his guard against making admissions, the importance of which he must have been well aware of. The answer states that the defendant has, in his possession, certain documents; and

the defendant now wishes to state that he has not those documents in his possession. This case therefore stands in a different situation from those cases in which a supplemental answer has been allowed to be put in: for, in most of those cases, the statement proposed to be made, was supported by written documents, so that there could be no doubt of its truth. But, in this case, it is just the reverse; for this defendant seeks to withdraw documents which he has admitted to be in his possession. In this case, too, the defendant was not taken by surprise, as he must have been aware of the consequences of making the admissions which he now seeks to contradict: and I could not establish a more dangerous precedent than by allowing this defendant to put in a further answer, and thereby to vary the case now on the record, which is beneficial to the plaintiff. The safety of mankind requires that I should refuse this application, with costs.*

The defendant, afterwards, moved before the Lord Chancellor, that the above order might be discharged, and that an order might be made pursuant to the original notice of motion: but his lordship refused the motion, without costs.

Eales *v.* Conn.

4 *Simons*, 65.

By a marriage settlement an estate was limited to the husband for life remainder to trustees for five hundred years, for raising younger children's portions, remainder to the sons of the marriage in tail. By an agreement indorsed on the settlement before its execution, and signed by the husband and the father of the lady, it was agreed that, if the lady should die without leaving issue of the marriage, the husband, after her death, should pay, to her father, 600*l.*, and that, in default of payment, it should be raised by demise, &c. of the term. There was issue of the marriage a son and a daughter, the latter died an infant in her mother's lifetime, the son attained twenty-one, and suffered a recovery, and he also died in his mother's lifetime: Held, that, notwithstanding an estate tail had vested, in the son, before the 600*l.* was raiseable, the recovery did not defeat that charge.

December 10, 1830.

BY the settlement on the marriage of John Harris with Mary the daughter of John Sharland, certain real estates in Cornwall, the property of the husband, were, in consideration of the intended marriage, and of 1000*l.* paid by Sharland as the marriage portion of his daughter, limited to the use of Harris for life, with remainder to the use of Mary Sharland for life, with remainder to the use of trustees for five hundred years, and, subject thereto, to the use of the first and other sons of the marriage in tail male, with the ultimate remainder to the use of Harris in fee. The trusts of the term were for raising 1000*l.* for the portions of the younger children of the marriage. Upon the settlement was indorsed a memo-

* See Hewes *v.* Hewes, *ante*, p. 1.

randum of an agreement made between Harris and J. Sharland before the execution of the settlement, the effect of which was that, if Mary Sharland should die without leaving any issue of the marriage living at her death, Harris, his executors or administrators should, within three months after her death, pay to J. Sharland, his executors or administrators, 600*l.* part of the 1000*l.*; and that, in case Harris or his representatives should fail to pay the 600*l.* within the time limited, it should be lawful for the trustees to raise the same by demise, sale or mortgage of the premises comprised in the term, in the same manner as they were directed to do for raising the younger children's portions. This memorandum was signed by Harris, previous to the execution of the settlement, and with the privity of the parties thereto.

There was issue of the marriage a daughter, who died an infant, and without having acquired a vested interest in the 1000*l.*, and a son, J. Sharland Harris. J. Harris died in the lifetime of his wife; and J. S. Harris having attained twenty-one, joined with his mother in suffering a recovery of the estates, by virtue of which he, as the bill alleged, became entitled to the estates, in fee, subject to his mother's life estate, and the term of five hundred years, and the trusts or provisoes contained in the memorandum of agreement. The bill further alleged that J. S. Harris and his mother, afterwards, sold a certain part of the estates, and that the plaintiff, who was the personal representative of J. Sharland, joined, at Harris's request, in the conveyance to the purchaser, in order to exonerate the same from his claim in respect of the 600*l.*, and that it was agreed and declared, by the conveyance, that the 600*l.* was to continue a charge upon the remainder of the estates. The bill further stated that J. S. Harris afterwards, without the plaintiff's privity, conveyed, the remaining part of the estate to William Bate, under whom the defendants claimed; that J. S. Harris died in 1822 without having had any issue; that his mother, who had married William Binford, died in 1824, and, at her death, there was no issue living of her marriage with John Harris, and, therefore, the plaintiff became entitled to receive the 600*l.*; but no part thereof had been paid to him. The bill then charged that the defendants, or Bate, under whom they claimed, had notice of the settlement, and of the memorandum indorsed thereon, previous to or at the time when the premises were conveyed to them, and that no part of the personal estate of J. Harris remained unadministered. The bill prayed for a declaration that the 600*l.* was a charge upon the premises in the possession of the defendants, and that that sum, with interest from the death of Mary Binford, might be raised, by sale or mortgage thereof, for the residue of the term of five hundred years, or out of the rents and profits thereof, or by sale or mortgage of the inheritance thereof.

Two of the defendants pleaded a recovery suffered, in 1802, by Binford and wife and J. S. Harris, by which the estates were limited to George Sharland, for the life of Mrs. Binford, with remainder to the use of such persons as J. S. Harris should appoint, with remainder to the use of Mrs. Binford in fee.

Sir E. Sugden and Mr. Spence in support of the plea:

As the trust of the term which is now sought to be executed, was to arise after the estate tail, the question is whether it is not a trust so overriding the estate tail, as to be barred by the recovery. Suppose that the estate had been settled on the father for life, with remainder to the mo-

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ther for life, with remainder to the first and other sons in tail, and that there was a proviso, in the settlement, that, if there should be a failure of issue male at the death of the mother, a term should take effect to secure 600*l.*; it would have created a good springing use; but the recovery would have barred it. The sum would not become due until after the estate tail had vested, and, consequently, not until after a right had accrued, to the tenant in tail, to suffer a recovery. It was a charge to arise on the estate tail, subsequent to the period of that estate becoming vested. There are many cases in the books, where, by force of a spring use, an estate tail would cease; and yet every thing that could take effect in derogation of the estate tail, would be barred by a recovery suffered by the tenant in tail. In the first place, there was an estate tail vested; and, in the next, this interest was to take effect as a charge upon the estate tail. The operation of the charge, therefore, would defeat the estate tail *pro tanto;* and whatever would defeat an estate tail subsequent to its creation will be barred by a recovery. This point has often occurred with reference to powers: and there never was any doubt that every power, the execution of which would charge the estate tail, is barred by a recovery which cuts off the estate tail. Benson *v.* Hodson, 1 Mod. 108.

Mr. Knight and Mr. Jacob appeared in support of the bill.

But the Vice-Chancellor, without hearing them, said:

This plea is not good in substance.—Where, by a marriage settlement, an estate is limited to the father, for life, with remainder to trustees, for a term of years, to raise portions for younger children, with remainder to trustees, for another term, to raise increased portions for daughters, in case there is no issue male of the marriage, it is the intention of the parties to give to the father power, by joining with his son in suffering a recovery, to defeat the subsequent term. Here it is plain that it was the intention of the parties to give a legal term antecedent to the estate tail, and to put it out of the power of the father to defeat the term; and, therefore, the legal term remains. The trust for raising portions for the younger children of the marriage has ceased, by the death of the daughter before she acquired a vested interest in the sum to be raised; but the trust for raising the 600*l.* is still subsisting; and, it being the intention of the parties to put it out of the power of the father to defeat the trusts of the term, the plaintiff is now entitled to have that sum raised.

Plea over-ruled.

On the 8th of August, 1831, the Lord Chancellor affirmed the above decision.

Lodge *v.* Lyseley.

4 *Simons*, 70.

A father, tenant for life, with remainder to his son in tail, joined with his son in conveying the estate to trustees in trust to sell, and to pay 30,000*l.* to the father and the residue to the son: and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to defendant, and afterwards judgments were entered up against the father: Held, that the existence of the judgments was no objection to the title.

March 28, 1832.

IN February, 1827, George C. Montagu, Esq., being tenant for life of certain real estates, with remainder to his son, F. C. Montagu, in tail, joined with his son in suffering a recovery of and conveying the estates to the use of the plaintiffs, in trust to sell; and it was declared that the trustees' receipts should be sufficient discharges to the purchasers, and that all contracts which the trustees should enter into in pursuance of the trusts, should be binding, without the concurrence of either the father or the son. By deed of even date, after making provision for redeeming certain annuities and mortgages created by G. C. Montagu, it was declared that the trustees should stand possessed of 30,000*l.*, part of the moneys to arise from the sale, in trust for G. C. Montagu, his executors, &c., and, of the remainder, in trust for F. C. Montagu, absolutely. The plaintiffs agreed to sell the estates to the defendant, and, afterwards, judgments were entered up against Mr. Montagu the elder, for debts, some of which were contracted before and others after the conveyance to the plaintiffs. The purchaser objected to the title on the ground that the judgments formed a lien on the estate; and this suit was instituted to enforce the completion of the contract.

Sir E. Sugden, Mr. Preston and Mr. Wilbraham, for the plaintiffs:

Where an estate has been conveyed to trustees, it may be affected by a judgment confessed by the grantor, so long as it remains vested in the trustees; but, if the trustees part with the estate before execution sued out, the judgment-creditor's remedy is lost: Hunt *v.* Coles, Com. 226. As a binding contract for the sale of the estate in this case has been concluded, no judgment can be executed upon it. Here the father being tenant for life, and the son tenant in tail, agree to sell the property, to pay off the father's incumbrances, and to pay him 30,000*l.* with interest, and the son is to take the residue. What is that but a purchase, by the son of the father's life estate. The moment after the conveyance to the trustees was executed, the father was entitled, not to any interest in the estate, but to 30,000*l.* If the father had died immediately after the execution of the conveyance, his life estate would be gone, but his personal representatives would be entitled to the 30,000*l.* with interest. It is impossible that any of these judgments could affect an estate which is no longer vested in the father. After the conveyance in trust to sell, the father did not retain any interest, either at law or in equity. His life estate was sold out and out; and he would take the 30,000*l.*, but he never

[Lodge *v.* Lyseley.—4 Sim. 70.]

could be restored to the receipt of the rents. The opinion of Mr. Sergeant Hill, which is printed in a note to the report of Forth *v.* The Duke of Norfolk, never has been followed.*

Mr. Knight, Mr. Coote and Mr. Hayter, for the defendant:

If there is any reasonable doubt as to the point now before the court, the purchaser cannot be compelled to accept the title. That such a doubt exists is clear from the opinion of Mr. Sergeant Hill, which has been referred to in the argument for the plaintiffs, and from what is said by an eminent living author.† The question is whether the judgment-creditors have not a right to file a bill for the purpose of intercepting that portion of the proceeds of the sale, which, according to the provisions of the deed, is payable to the trustees for the purpose of being handed over to the tenant for life. If the judgment-creditors have that right, then it is clear that the purchaser, having notice of the judgments, cannot safely complete his purchase, without having their demands satisfied. The language of Sir John Leach, V. C. in Forth *v.* The Duke of Norfolk, is this: "A judgment-creditor has, at law, by the Statute of Frauds, execution against the equitable freehold estate of the debtor, in the hands of his trustee, provided the debtor has the whole beneficial interest: but, if he has left a partial interest only in his equitable freehold estate, the judgment-creditor has no execution at law, though he may come into a Court of Equity and claim there the same satisfaction out of the equitable interest as he would be entitled to at law, if it were legal. Every voluntary assignee of this equitable interest of the debtor, will be in the same situation, with respect to the claim of the judgment-creditor, as the debtor himself was. Every assignee for valuable consideration will hold this equitable interest discharged of the claim of the judgment-creditor, unless he has notice of it before his consideration is paid." The owner of an equity of redemption cannot sell it discharged from a judgment of which the purchaser has notice. This case is much more analogous to a case of that description than to the case of a trust estate. The case submitted to Mr. Sergeant Hill is exactly parallel to the present one: except that, there, the question related to the safety of the trustee in handing over the money to the creator of the trust, and, here, it is whether the money can be safely paid to the trustees. But still, if Mr. Sergeant Hill's opinion is right, it shows that the judgment is a lien on the money; nor does the circumstance of the property being mere personalty, make any difference. In Dillon *v.* Plaskett, 2 Bligh, New Series, 239, Lord Dillon limited a term for years to trustees, in trust to pay him an annuity for his life; and the effect of the decision of the House of Lords was to give the judgment-creditors a lien on that personal fund. The judgment-creditors, therefore, in the present case, would have a clear right to file a bill for the purpose of pursuing the father's remaining equitable interest in his life estate. That is a position which cannot admit of any doubt: but the question is, whether the judgment-creditors have a right to intercept the payment to the trustees. Now a judgment-creditor may be treated as an assignee; and has not an assignee of a trust fund a right to

* 4 Madd. 506. In the statement of this case in Sugd. Vend. 8th edit. 476, the author adds that the purchaser had paid off the mortgage, and taken a surrender of the term.

† See Sugd. Vendors, 8th edit. 478, 479, 480.

[Lodge *v.* Lyseley.—4 Sim. 70.]

file a bill to prevent its being paid to the trustee for the assignor, unless his debt is first satisfied?

The transaction between the father and son was a mere voluntary arrangement, and, by virtue of it, there was an equity remaining in the father, sufficient to enable the judgment-creditors to maintain their lien, to the extent of the 30,000*l.*, which was, in fact, so much of his old estate remaining. But, if the court should hold that it was not an arrangement, but a sale, then the tenant for life is in the same situation as a vendor, who has allowed the purchase-money to remain on the estate, the judgment being given before the money is paid by the purchaser. How could the lien have arisen in Forth *v.* The Duke of Norfolk, if it does not arise in the present case?

The Vice-Chancellor:—This is a case upon which I have no doubt. By the conveyance to which the father and son were parties, the son acquired a clear right, in equity, to have the trusts expressed in the conveyance performed; because he amalgamated his remainder in tail (which was converted into a fee by the recovery) with the father's life estate; and it was agreed between them that there should be an immediate sale of the whole, and a division made of the purchase-money. Part was to be applied in payment of the father's debts, and 30,000*l.* was then to be paid to the father, and the clear residue was to be paid to the sons; therefore, as soon as the conveyance was executed, the son had a clear right to file a bill, against the father and the trustees, for a sale, according to the trusts expressed: and, inasmuch as part of the trust is that the trustees should sell and give releases to the purchaser, there could be no execution of the trusts, without allowing the trustees to receive the money, and give their receipts which were to discharge the purchasers.

This case bears no resemblance to the three cases mentioned. The case that it most resembles is that which was submitted for Mr. Serjeant Hill's opinion. But, even in that case, I confess that I should not have given the opinion which the learned serjeant did, because it appears to me that, from the time H. A. S. entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed; and, if he had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them.

The case of Lord Dillon *v.* Plaskett has no resemblance to the present, because there Lord Dillon created a term with trusts, which directed the trustees to receive the rents, and, after paying certain prior charges, to pay him 5000*l.* a year for his life, and then to keep down the interest on the debts. The very first trust of a beneficial nature for Lord Dillon, preceded the trust for the benefit of the creditors; and, when the Master of the Rolls in Ireland granted the receiver, on the application of a subsequent judgment-creditor, who was no party to the deed, the only question was, whether the receiver should be sustained in respect of the right of the subsequent judgment-creditor to receive a portion of the annuity: and it was, in my opinion, rightly decided that the receiver ought not to be discharged, because the 5000*l.* was received as a portion of the rents of the estate, for the benefit of Lord Dillon alone.

As to the case of Forth *v.* The Duke of Norfolk no decision was given there on the point which might have arisen, because the chattel interest

had ceased to have existence. My notion is that it is of the essence of the trusts, which the son, as the purchaser, has a right to have performed, that the trustees should convey the legal estate and give receipts for the purchase-money. My opinion is so clear that I do not think that I ought to allow the purchaser to say that there is a doubt on the point: and, if this were a hostile case, I should have given costs.

Colclough *v.* Evans.

4 *Simons*, 76.

After an original cause is at issue, the plaintiff cannot file a supplemental bill for the purpose of changing the issue raised by obtaining a discovery of facts and documents, which might have been introduced by amendment into the original bill, although the supplemental bill alleged that those facts and documents were not known to the plaintiffs, till after the original suit was at issue.

December 10, 1830. January 10, 1831.

THIS bill stated that in Hilary Term, 9 & 10 Geo. 4., the plaintiffs, Colclough and Hall, filed their bill, in the Court of Chancery, against the defendant, (which was afterwards amended by making the three other plaintiffs, Elizabeth Haddon, Geo. Talbot Sinclair and Henry Setree, parties complainants thereto,) stating an agreement made and signed between and by Charles Sinclair, and Robert Edginton, as the agent of the defendant, whereby Edginton, as such agent, and especially under the authority of a letter from the defendant to Edginton, dated January 14, 1825, agreed, for the defendant, to sell to C. Sinclair, all the defendant's interest in the real and personal estate of the late Sir W. Lewes, for 6000*l.*, the defendant being the heir, and one of the next of kin of Sir W. Lewes: and also stating that Edginton was duly authorized to enter into and sign the agreement as the defendant's agent; and referring, but not particularly, to letters which passed between the defendant and Charles Sinclair and their respective solicitors, whereby it appeared that Edginton was duly authorized to enter into and sign the agreement as agent for the defendant, and that he subsequently recognized and adopted the contract: and also stating the death of C. Sinclair, and his will, under which the plaintiffs became entitled to the benefit of the contract: and praying for a specific performance of the agreement. The bill further stated that the defendant, in his answer to the said original and amended bill, denied the authority of Edginton, and stated that, until he procured a copy of the bill, he did not know or hear of any such contract having been signed by Edginton, on his behalf, and insisted that the court would not carry the contract into effect: that the answer had been replied to, and the cause was then at issue: that, since the cause was at issue, the plaintiffs had discovered that the letter of January, 1825, was not written by the defendant, but that, he being disabled by illness, his wife wrote it by his direction and on his behalf, and that the defendant had long been in the habit of permitting his wife to write letters relating to his affairs, for him, and to sign his name thereto; and that she did in fact write and

[Colclough *v.* Evans.—4 Sim. 76.]

send, by his direction or with his privity and sanction, some of the letters mentioned, in the original and amended bill, to have been written and sent by the defendant, and other letters purporting to have been written and sent by him, in relation to the matters in the said bill mentioned, dated in 1825 and 1826: that, since the original suit was at issue, the plaintiffs had discovered, as the facts were, that the defendant, in 1823, was negotiating with one Francis Fortune, for the sale to him of the property in question, and that, on the 7th of July, 1823, the defendant, or his wife in his name and on his behalf, wrote and sent to Mr. Evans, Fortune's solicitor, a letter, the contents of which were stated in the bill: the bill further stated that though it was alleged, by the defendant, that Edginton was not authorized to sign the agreement on his behalf, and that the defendant, until he perused a copy of the original bill, did not know or hear that any such contract had been so signed, and that the defendant never assented to or adopted the agreement, and that the sum agreed to be given was an inadequate consideration for the purchase, yet the contrary appeared, by the letters before referred to, and other letters, written by, or in the name of, the defendant, and by his then solicitor, Mr. Lewis, to Charles Sinclair, and to the plaintiff Henry Setree, Sinclair's then solicitor, and other persons, and, also, from various other letters, written and sent, by Charles Sinclair and the plaintiff, Setree, to the defendant and Lewes, and which were perused by and communicated to the defendant, and from which letters it further appeared that, long previous to the date of the contract, the defendant was fully acquainted with the value of his interest in the estate of the late Sir W. Lewes, and with the amount of the incumbrances thereon, and that he was, nevertheless, willing to sell such interest for the sum agreed upon. The bill then set forth the letters which passed between the last-mentioned parties, in the years 1825, 1826 and 1827, and charged that those letters, or some copies thereof, or extracts therefrom, were in the possession or power of the defendant, and that a discovery of such letters and matters aforesaid, was necessary to the plaintiffs, for the purposes of their original suit, and that they were entitled to have such discovery from the defendant, and to have such of the letters, as were in the defendant's possession, produced, for the purpose of being proved in the original suit, and that, if those letters were not produced, the plaintiffs ought to be at liberty to give copies thereof in evidence. The bill prayed that the defendant might produce such of the letters as were in his custody or power, and set forth what was become of such as were not in his custody or power and their material contents, and that the plaintiffs might have a discovery of all the matters aforesaid, and might have the benefit thereof, and of all such proofs as they might be able to adduce in relation to the letters and matters aforesaid, in such manner as the court should direct, the plaintiffs offering to abide such order, in relation to their costs of that their supplemental suit, as the court should direct: and for further relief.

The defendants demurred generally to the bill.

Sir E. Sugden and Mr. West, in support of the demurrer, said, that the bill was filed for the purpose of evading the new orders as to amendment: that all the letters were written before the original bill was filed, and, therefore, they might have been introduced, by amendment, into the original bill, under the 15th of Lord Lyndhurst's orders: that the court never permits a supplemental bill to be filed for the purpose of putting

in issue matter which may be inserted, by amendment, in the original bill. Ryan *v.* Steuart, 1 Cox, 397; Milner *v.* Lord Harewood, 17 Ves. 144. 148; The Dean and Chapter of Christ-church *v.* Simonds, 2 Mer. 467; Knight *v.* Matthews, 1 Madd. 566; Macneill *v.* Cahill, 2 Bligh, 228: that this was a bill for relief, Rose *v.* Gannel, 3 Atk. 439: that the court could not administer justice between the parties, owing to the way in which the parties had put their case: for, when the original cause should be heard, it would be heard upon imperfect evidence, and the court would first hear one half of the case, and, when the supplemental cause came on to be heard, it would then hear the other half: that, at all events, leave ought to have been obtained to file the bill.

Mr. Knight and Mr. Girdlestone, jun. in support of the bill, said, that the bill related to two classes of evidence, one which was discovered after replication, and the other before: that it was laid down, by Lord Redesdale, that, where the imperfection of a suit arises from a defect in the original bill, and not from any event subsequent to the institution of it, it might be added to by a supplemental bill; and that a supplemental bill might be filed to obtain a further discovery from a defendant, to put new matter in issue, or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose, (Treat. Plead. 3d edit. 48, 49. See also 263): that an application to amend could not be made after replication: that no authority could be produced to show that it was necessary to have the leave of the court to file a bill of discovery before decree: that, though the cause was at issue, no witnesses had been examined: that the allegation, in the bill, that the facts stated in it had been discovered since the cause was at issue, was conclusive. Usborne *v.* Baker, 2 Madd. 379.

The Vice-Chancellor:—In my opinion this is not a supplemental bill of discovery merely, but a bill for discovery and relief. It is filed for the purpose of putting in issue special matter contradictory to the allegations in the original bill, and of having the benefit of such proof as the plaintiffs may give in support of the allegations in the supplemental bill. It prays general relief; and the offer, in the prayer, to abide such order, in relation to the costs of the supplemental suit, as the court shall direct, shows that the plaintiffs consider the supplemental bill as a bill for relief. For, if it were merely for discovery, they would have to pay the costs, as a matter of course. All the matters stated in the supplemental bill happened before the filing of the original bill, and therefore they might all have been introduced by amendment, if the state of the proceedings had made amendment allowable. It is stated, indeed, that the plaintiffs have discovered the new matters since the filing of the original bill, and, of the truth and importance of that allegation, the court would have judged if an application for leave to amend had been made. But that statement alone will not make the bill supplemental, or show that it is proper.

If the new orders had not existed, an amendment could not have been made without special leave, the cause being now at issue; neither could the supplemental bill have been filed without leave, because it seeks to change, completely, the issue raised by the original bill; for, in the original bill, it is averred that the material letter was written by Herbert Evans, and, in the supplemental bill, it is averred that the letter was not written

by him. The bill, therefore, is, strictly, not supplemental, but one which seeks to make a new and different case, and is, in substance, an amendment. Since the new orders, an amendment could not have been permitted without special leave; and to permit such a bill as this, would, I think, be permitting the plaintiffs to do, indirectly, what the new orders intended should not be done, except upon special leave. Therefore, I allow the demurrer; but without prejudice to the plaintiffs making such application to withdraw the replication, and to amend their original bill, as they may be advised.

Murray *v.* Barlee.

4 *Simons*, 82.

A married woman, having separate property, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property: Held, that that property was liable to pay the bills.

December 10, 1830. January 10, 1831.

THE bill, which was filed against Charles William Barlee and Frances Sarah his wife, and the continuing trustee of their marriage settlement, stated that, by the settlement on the marriage of Charles William Barlee with Frances Sarah Mitchell, certain freehold estates were conveyed to three trustees and their heirs, to the intent that they should, yearly, during the joint lives of Charles Barlee and Catharine his wife, and of Frances Sarah Mitchell, and after the decease either of Charles Barlee or Catharine his wife, then during the joint lives of the survivor of those two persons, and of Frances Sarah Mitchell, receive a rent-charge of 100*l.* in trust, to pay and apply the same, from time to time, unto, or permit Frances Sarah Mitchell to receive the same, for her sole use, exclusive of her then intended, or any future husband, so that the same might not be under his control, or subject to his disposition, debts or engagements, and so that the receipts of F. S. Mitchell, or her appointee, might, notwithstanding her coverture, be a good discharge for such part of the same as should therein be expressed to be received.* And certain other freehold estates were conveyed unto and to the use of the trustees and their heirs, during the life of Frances Sarah Mitchell, upon the like trusts, for her separate use, during her life, as before mentioned: and it was declared that 400*l.* three per cents, which had been transferred to the trustees, should be held by them upon trust to pay and apply, or to suffer Frances Sarah Mitchell to receive the interest, profits and produce to arise therefrom, during her life, for her sole use, independent of her then intended or any future husband, and for which her receipts alone,

* The settlement contained clauses restraining Mrs. Barlee from anticipating, charging, or assigning the growing payments of this rent-charge, and also the dividends of the aftermentioned sum of stock, before they became due; but these clauses were omitted in the bill.

[Murray *v.* Barlee.—4 Sim. 82.]

notwithstanding her coverture, were to be good discharges: and the settlement contained a covenant to surrender certain copyhold hereditaments to the trustees, upon the same trusts as were declared of the last-mentioned freehold estates. The bill further stated that, soon after the execution of the settlement, Charles William Barlee and Frances Sarah Mitchell intermarried together: that before 1819 they separated, and had, ever since, lived apart: that, in April, 1819, Mrs. Barlee, by her next friend, filed a bill against her husband and the trustees of the settlement, praying for an account of the rents and dividends of the property settled to her separate use; that, by the decree made on the hearing of the cause, on the 11th of March, 1825, it was referred to the Master to take an account of the rents and dividends received by the trustees: that by an order made, on further directions, on the 23d July, 1828, two of the trustees were discharged; and it was ordered that a receiver should be appointed of Mrs. Barlee's separate property: that no new trustees had been appointed in the room of the trustees who had been discharged; and that the 400*l.* stock had been transferred into the name of the accountant-general, in trust in that cause: that a receiver had been appointed in pursuance of the order of July 1828: that he was in receipt of the income of the property settled to Mrs. Barlee's separate use, and had paid part of the sums which he had received into the bank, in trust in the last-mentioned cause: that the plaintiffs were retained by Mrs. Barlee, and acted as her solicitors in that cause, from June 1824 till November 1828, when she discharged them from being her solicitors: that the fees, charges and disbursements which became due, to the plaintiffs, in respect of the prosecution of that cause, had been paid or provided for under different orders made therein: that, in August 1824, a petition was presented to the Lord Chancellor, by Mr. Barlee, for a commission of lunacy against Mrs. Barlee; that the plaintiffs were retained by Mrs. Barlee, as her solicitors, to oppose the petition, and the same was dismissed: that in 1824, at the time when the plaintiffs were so retained by Mrs. Barlee, she was in Ipswich gaol, under the process of an Ecclesiastical Court, and she employed the plaintiffs, as her solicitors, to endeavour to procure her liberation, and the plaintiffs obtained a *habeas corpus*, under which she was brought up and discharged: that, in 1825, Mrs. Barlee retained the plaintiffs, as her solicitors, to institute a prosecution against certain persons for a conspiracy; and the plaintiffs accordingly instituted and carried on such prosecution: that, in 1825, the plaintiffs were retained by Mrs. Barlee, and acted, as her solicitors, in a suit instituted against her by John Mapes and others, seeking to charge her separate estate with certain debts alleged to have been incurred by her, for board, lodging, and other necessaries, whilst living apart from her husband: that no part of what had become due to the plaintiffs, for fees, charges, and disbursements, in the proceedings before-mentioned, had been paid to them, except their costs in the suit of Barlee against Barlee and others, and except that Mrs. Barlee had occasionally paid, to them, out of her separate property, some sums of money on account of costs incurred in other matters and causes, and that 700*l.* and upwards then remained due to the plaintiffs; that, more than a month since, the plaintiffs had signed and delivered, to Mrs. Barlee, their bill of fees, charges and disbursements, but no part thereof had been paid: that Mr. Barlee, several years ago, became bankrupt, and was still insolvent, and resided out of the jurisdiction of the court: that Mrs. Barlee, during the time the plaintiffs acted as her solicit-

ors, from time to time, wrote to them various letters, in which she instructed them to act as her solicitors, in the several causes and matters before mentioned, and, in some of such letters, she adverted to her husband's bankruptcy and insolvency, and his leaving this country to avoid his creditors, and promised the plaintiffs, or gave them to understand that she would pay the costs and charges to become due, to them, for business done by them for her, although she did not thereby refer to her separate property, or expressly promise to pay such costs and charges by means thereof: that, during the time when the plaintiffs were retained by and acted as the solicitors of Mrs. Barlee, she had no property except the income of her separate estate, and had no other means of paying the plaintiffs; but they consented to act for her, in the expectation that she would pay them out of such separate property. The bill prayed that it might be declared that the amount due to the plaintiffs, for their fees, charges and disbursements, ought to be paid to them out of the income of Mrs. Barlee's separate property, and that a sufficient part of the moneys paid into the bank by the receiver in the cause of Barlee against Barlee, and of the moneys to be hereafter received on account of Mrs. Barlee's separate property, might be applied in payment of what was due to the plaintiffs, and that, in the mean time, Mrs. Barlee might be restrained from receiving any part of the proceeds of such separate property.

The defendant, Mrs. Barlee, put in a general demurrer to the bill.

Mr. Pepys and Mr. Girdlestone, jun., in support of the demurrer:

The general engagement of a married woman does not affect her separate property. It is not pretended that the letters which Mrs. Barlee wrote to the plaintiffs, and by which she retained them as her solicitors, contained any reference to her separate property: the plaintiffs, therefore, cannot be entitled to be paid their bills of costs out of her separate estate. Greatley *v.* Noble, 3 Madd. 79.

Sir E. Sugden and Mr. Jacob in support of the bill:

The question raised by this demurrer, is unaffected by decision. Here a married woman having separate property only, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them, in writing, that she would pay their bills of costs. Any security given by a married woman having separate property, will charge that property, although no reference is made to it. Hulme *v.* Tenant, 1 Bro. C. C. 16, is a direct authority for that proposition. The security cannot be supported as a defective execution of the power which a married woman has to appoint her separate property; for no instrument can be an execution of a power, unless it refers either to the power or to the property which is subjected to it. The security is evidence of a contract to pay the debt out of her separate property. As the married woman, by giving the security, is providing for the payment of her debt, it must be paid out of the only property which she has. The separate property is hers, for all the purposes of enjoyment, and to answer all her obligations. The security is evidence of a contract to pay the debt, and it must be considered as an obligation to pay it out of her separate property, as she has no other way to answer her engagements. The retainer of the plaintiffs amounted to a contract to pay their bills of costs. That contract could not be enforced against the husband, nor against the wife, personally; and, therefore, it could not be enforced at all, unless effect is given to it against the

wife's separate property. In Hulme *v.* Tenant, Lord Thurlow says: "But the question is, how far her general personal engagement shall be executed out of her separate property? If she had, by instrument, contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but, if she enters into an engagement which would make a *feme sole* liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such general engagement entered into by a *feme covert* will not bind her as such. It is not like the case of an infant, who is incapable of acting; but, in respect to a *feme covert*, determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, and shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement." There is not a case which has not professed to save whole and to follow Hulme *v.* Tenant. A promissory note given by a married woman, is not a charge upon her separate property. It is only evidence of the debt. When she contracts the obligation, she binds her estate, and not when she gives the note. It has been decided that any writing will be sufficient for that purpose. Clinton *v.* Willes, Sugd. Pow. 5th edit. 114, note. In Stuart *v.* Lord Kirkwall, 3 Madd. 387, the decision was right, but the ground of it is not satisfactory, for the bill of exchange was considered, not as evidence of a general engagement by the married woman, but as a defective execution of a power, which it could not be, as neither the power, nor the property was referred to. Wherever there is an express contract by a married woman having separate property, and not an implied *assumpsit* only, that property becomes available to the payment of the debt. In Norton *v.* Turvill, 2 P. W. 144, the plaintiff was held to be entitled to be paid his debt, in the character of a creditor generally, and not of a bond-creditor. In Peacock *v.* Monk, 2 Ves. 190. 193, a bond given by a married woman having separate estate, was not treated as an appointment, but was held to give a foundation to demand the money against her, out of her separate estate, *she being to be considered as a feme sole as to it.* In Standford *v.* Marshall, 2 Atk. 69, the bonds in which the married women joined with their husbands, were not looked upon as appointments, but were considered to have made their separate property liable to their general engagements. Lillia *v.* Airey, 1 Ves. jun. 277, is an express decision that the general contract of the wife fixes itself upon her separate property. It appears by an anonymous case, 18 Ves. 258, what was the opinion of Sir William Grant upon this subject: for his Honour decided that a bond-creditor of a married woman having separate property, was not entitled to priority over her other creditors, but that they must all be paid *pari passu.* If securities given by a married woman were to be considered as appointments, then the creditor who has got the earliest bond or note would be entitled to be paid first. But the case last referred to is a direct decision to the contrary; for there it was held that all the creditors were to be paid equally; which proves that it is the practice of the courts to consider the separate estate as assets generally. In Duke of Bolton *v.* Williams, 2 Ves. jun. 138; S. C. 4 Bro. C. C. 297, and Jones *v.* Harris, 9 Ves. 486, it was held that the married woman's separate property was not liable to repay the consideration for the annuity, as there was no contract to do so, but only to pay

the annuity: for an implied *assumpsit* is not to be created against the separate estate of a married woman; for an *assumpsit* must be first implied, and then an engagement to pay out of the separate estate. In Jones *v.* Harris, Lord Eldon held that one contract should not be turned into another, and that, from one promise, an implication of another could not be drawn. That case and Duke of Bolton *v.* Williams go to show merely that the separate property of a married woman is not liable in cases of fictitious contract. In Greatley *v.* Noble, 3 Madd. 79, the relief was not sought to be obtained by virtue of any contract; but it was said, in that case, that, where a married woman enters into an express agreement to pay a debt, it must be paid out of her separate estate. There was a case before Sir Thomas Plumer in which the present question was discussed, Francis *v.* Wigzell, 1 Madd. 258. There the Vice-Chancellor allowed the demurrer, because the bill did not pray that the purchase-money might be paid out of the wife's separate estate; but whether the plaintiff might or might not have so framed his bill, he did not decide. All persons who deal with married women having separate property, deal with them as having such property, and in the expectation of being paid out of it. Here the plaintiffs dealt with a married woman having separate property, and both they and she knew that she had no other means of paying them. If they were to sue the husband at law, they would be told that they could not recover, as they dealt with the wife, and on the faith that they should be paid out of her separate estate. We ask a Court of Equity to make the same implication as a Court of Law would. It makes no difference whether the writing is in the form of a letter or of a bond; the writing is necessary only as evidence of a promise to pay.

The Vice-Chancellor, (after stating fully the contents of the bill) continued as follows:

Mrs. Barlee has put in a general demurrer to this bill; and the question raised by the record, is whether, where a *feme covert* having property settled to her separate use, has become indebted, and has promised to pay the debt, though not, expressly, out of her separate estate, her separate estate will, thereby, become liable to pay the debt.

At law a married woman cannot, by any act of her own, make herself liable to be sued in any of the king's courts at Westminster. That was decided in the case of Beard *v.* Webb, 2 Bos. & Pull. 93, in the Common Pleas, and, shortly afterwards, in the King's Bench, in the case of Marshall *v.* Rutton, 8 T. R. 545. It is to be observed that a Court of Equity, by securing, to a married woman, property that is settled to her separate use, gives her benefits by subjecting it to her general disposition, and by freeing it from her husband's control: but, at the same time, it does not place her in a worse situation, in any respect, than she would otherwise be in at law. It leaves her unaffected by every contract and liability, except when she does any act affecting her separate property, in which case the court holds her property to be bound, but leaves her person free. In the case of The Duke of Bolton *v.* Williams, 2 Ves. jun. 138; S. C. 4 Bro. C. C. 297, Mrs. Williams had a rent-charge, for her separate use, payable out of The Duke of Bolton's estate; and she had granted annuities secured upon that rent-charge, and the annuity deeds were void under the annuity act, and the Duke of Bolton filed bills of interpleader against the annuity-creditors and Mrs. Williams. Lord Rosslyn, in affirming

[Murray *v.* Barlee.—4 Sim. 82.]

Lord Thurlow's decree said: "The necessary consequence is, the payment must be made to Mrs. Williams. I have no right to stop her from receiving it, leaving it open to what they can do against her. I finish this cause by saying they have no right nor any lien upon it, but are only general creditors of her." In the report of the case in 4 Bro. C. C. 297, language to the same effect is found. So also in Nantes *v.* Carrock, 9 Ves. 188, Lord Eldon expressed his opinion that he could not make the stock of a married woman, which was settled to her separate use, liable to her general debts; because her creditors had no lien upon it. In Jones *v.* Harris, 9 Ves. 486, which was similar, in its circumstances, to the case of The Duke of Bolton *v.* Williams, except that, in the former case, the creditor was the plaintiff, and claimed, expressly, by virtue of the implied *assumpsit*, against the separate estate of the married woman, Lord Eldon decided that he could not give effect to the implied *assumpsit* against the separate estate of the defendant. An opinion to the same effect was expressed by the Vice-Chancellor, in the case of Greatley *v.* Noble, 3 Madd. 94, and also in the case of Stuart *v.* Lord Kirkwall, Ibid. 387. Therefore I consider the law upon that point to be settled both in principle and by decision, and, if the question in this cause turned on the implied *assumpsit*, I should allow the demurrer; and the defendant's counsel has argued that I ought to do so, upon that ground.

In this case, however, there is not only what may be called debt, which would raise the implied *assumpsit*, but there is also an express promise to pay. Now, in considering what may be the effect of that express promise, I put out of consideration the case of Bell *v.* Hyde, Prec. Chan. 328, where there was a promise to pay out of the separate estate, and also the case of Bullpin *v.* Clarke, 17 Ves. 365, where there was a promissory note given, and also a promise, by letter, to pay out of the separate estate. There are, however, several cases in which a *feme covert* having separate property, has, either in respect of her husband's debt, or what may be called her personal debt, given her bond or note, and this court has ordered the bond or note to be paid out of her separate estate. The cases to which I allude are Norton *v.* Turvill, 2 P. W. 144; Standford *v.* Marshall, 2 Atk. 69; Hulme *v.* Tenant, 1 Bro. C. C. 16; Heatley *v.* Thomas, 15 Ves. 596; Anon. 18 Ves. 258: and Stuart *v.* Lord Kirkwall, 3 Madd. 387. In addition to those cases there are *dicta* to the same effect: one by Lord Hardwicke, at the end of the case of Peacock *v.* Monk, 2 Ves. 190; and another, by the Vice-Chancellor, in Greatley *v.* Noble, 3 Madd. 93; and I refer also to what was said, by Lord Alvanley, in Sockett *v.* Wray, 4 Bro. C. C. 483, and in a note, by Mr. Sanders, on Willats *v.* Cay, 2 Atk. 67: there, that learned judge expresses an opinion that, where a *feme covert* has separate property, Courts of Equity consider her as a *feme sole* with regard to it, but not as to her person, and that, where nothing turns on the form of her power and the mode of executing it, her bond will bind her separate estate. In the case of Clerk *v.* Miller, 2 Atk. 379, where a *feme covert* having separate estate, promised to pay her husband's creditors, the only doubt which the Master of the Rolls had was, whether, upon a promise that was made by parol only, her lands could be subjected to the debts: which shows that, if it had been in writing, he would have given effect to it out of her separate estate. It appears, however, from the case of Clinton *v.* Willes which was decided, at the Rolls, in 1820, and is referred to in Sir Edward Sugden's Treatise

on Powers, 115, that Sir Thomas Plumer thought that it would make no difference whether the debt was secured by a writing, as a promissory note, or not.

In the case of Mapes *v.* Barlee* which is referred to in this bill, the claim of the plaintiff rested upon two promissory notes which Mrs. Barlee had given; and she had also procured herself to be furnished with necessaries, upon a general representation that she had a separate estate: and, upon looking into the depositions in that cause, I observe that, besides the proof of the promissory notes, there is evidence given of an express promise to pay out of her separate estate: and the present Master of the Rolls, when Vice-Chancellor, made a decree, the effect of which was to give, to the plaintiff in that cause, the benefit of payment out of the separate estate of Mrs. Barlee.

In the case now before me, it is stated by the bill, and, therefore, admitted by the demurrer, that Mrs. Barlee had, by letters (the effect of which it has been represented to me is very fairly and correctly stated in the bill) promised the plaintiffs or given them to understand (which expressions I consider as equivalent to each other) that she would pay what was due to them. These statements have the same effect, as if it had been alleged that Mrs. Barlee had given a bond or a promissory note, to the plaintiffs, for the debt. Those instruments would have been of no avail as securities; but, as general promises to pay, they would have bound the separate estate, although that estate was not named. My opinion therefore is that the demurrer must be overruled.

On the 17th of November, 1831, the cause was heard, and the letters written by Mrs. Barlee to the plaintiffs, and the other evidence in the cause having been read, the Vice-Chancellor said that the letters supported the general averment in the bill, upon which he had held, upon the argument of the demurrer, that Mrs. Barlee's separate property was liable to the demands of the plaintiffs: and his Honour decreed that the plaintiffs' bills should be taxed; that they should give credit for the moneys which they had received from Mrs. Barlee, and the balance should be paid to them out of those particulars of her separate property as to which she was not restrained from anticipation.

* This cause was heard before Sir John Leach, Vice-Chancellor, on the 25th of January, 1827. It was objected by the counsel for Mrs. Barlee, that her answer could not be read as evidence to prove that she had separate property: but his Honour overruled the objection.

Green *v.* Bridges.

4 *Simons*, 96.

The court will not relieve a tenant against the breach of a covenant to insure. December 4, 1830.

ON the 10th May, 1815, the defendant granted, to the plaintiff, a building lease of a piece of ground, in the town of Bradford in Yorkshire, for nine hundred and ninety-nine years, at the yearly rent of 31*l.* 18*s.* 6*d.*: and the plaintiff covenanted that he would forthwith insure, and keep insured during the term, the buildings then erected, or which might thereafter be erected on the piece of ground, in a London Fire Insurance Office, in the joint names of himself and the plaintiff, for such sum and sums of money as, for the time being, should be amply sufficient for the re-building and reinstating the premises, in case they should be destroyed or damaged by fire, and also that he would, from time to time, during the lease, show, to the defendant or his heirs, the policies and receipts for such insurance. And the lease contained a proviso for the re-entry of the defendant and his heirs, in case the plaintiff should make default in the performance of any of the covenants in the lease.

After the lease was granted, the plaintiff expended a considerable sum in building on the ground demised to him; and he, at first, insured the buildings thereon for 1100*l.* in a London office, but in his own name only. In 1824 he transferred his insurance to an office in Yorkshire: and, for two short intervals, in 1828 and 1829, the buildings were not insured at all. On the 9th of January, 1830, the plaintiff insured the buildings, in a London office, in the joint names of himself and the plaintiff, for 800*l.* On the 18th of the same month, the defendant brought an action of ejectment against the plaintiff, for the recovery of the demised premises, on account of the plaintiff's non-compliance with the covenant to insure. In April, 1830, the bill was filed, charging that the defendant had permitted the plaintiff to expend money in erecting the buildings and had received the rent reserved by the lease, up to October, 1828, without any objection on account of the alleged breach of the covenant to insure, although he knew that the plaintiff had not strictly complied therewith; that the plaintiff had substantially performed the covenant: that, if there had been any breach of it, the same was involuntary, and done though inadvertence, and the defendant had sustained no damage thereby: that the plaintiff had tendered, to the defendant, the rent in arrear, and the costs which he had incurred in the action; and that, under those circumstances, it was a fraud, on the part of the defendant, to attempt to eject the plaintiff from the demised premises. The bill prayed for an injunction to restrain the action. The defendant, by his answer, denied that he had permitted the plaintiff to expend money in erecting the buildings, or had received the rent reserved by the lease, with notice that the plaintiff had not strictly complied with the covenant to insure, inasmuch as he did not know in what manner the insurance on the buildings had been effected, until December, 1829, ever since which time he had ceased to treat the plaintiff as his tenant. He admitted that

the value of the premises in reversion, after the expiration of the nine hundred and ninety-nine years, did not form any part of the consideration for the lease, or actuate him in granting it. He submitted, that any policies that might have been effected in the name of the plaintiff only, did not afford the least security, to the defendant, in case the buildings had been destroyed or damaged by fire, inasmuch as he could not have legally claimed or recovered the money from the insurance company. He admitted that, for any thing he knew to the contrary, the country office was an office of stability. He said that he did not believe that certain brick buildings, which the plaintiff erected in 1823, had been ever insured. He admitted that the demised premises were then of the annual value of 201*l.* 10*s.*, and that there then was and always had been, on the premises, distrainable goods more than sufficient to discharge the arrears of rent. He submitted that he was entitled to proceed with the action, because there had been, not only a material deviation, on the part of the plaintiff, from the strict meaning of the covenant, but a non-performance thereof: that the sum of 800*l.* would not be sufficient for the rebuilding and reinstating the premises in case they should be destroyed by fire, and that the insuring of the premises for so inadequate a sum, and the omission to insure the brick buildings which were erected in 1823, were continuing breaches of the covenant: that, although no loss had actually arisen, the risk incurred by the defendant by the breach of the covenant, for a series of years, had been considerable: he admitted that the plaintiff had tendered to him the rent in arrear, with interest, and also the costs of the action; but he submitted that the plaintiff was not entitled to be relieved from the breach of the covenant.

An injunction having issued for want of answer, the defendant, after having put in his answer, obtained the usual order *nisi*, and the plaintiff now showed cause against dissolving the injunction.

Mr. Pepys and Mr. Geldart, for the plaintiff:

The objections made by the defendant, are that the plaintiff did not insure in the right office, or in the joint names. But the answer admits that the country office was an office of stability; and, if the buildings had been burnt down, the plaintiff would not have been permitted to get possession of the money: so that the plaintiff complied with the covenant, in substance; for he furnished the means by which the defendant might have obtained the value of the premises. The landlord sustained no injury; and, as soon as the omission to insure according to the strict terms of the covenant, was complained of, it was rectified. In all the cases which have been decided upon breaches of covenants to insure, the tenant has had notice of the breach given to him, and has either wholly neglected to comply, or has first complied, and afterwards discontinued. In this case there has been an effective, valid insurance, which would have answered all the purposes of the landlord.

(The Vice-Chancellor:—The defendant swears that the brick buildings never have been insured.)

The answer admits that the premises are now worth 201*l.* per annum. The landlord's rent is 31*l.* only, and there always have been distrainable goods on the premises sufficient to pay the arrears of rent. The landlord has never been in danger of losing his property. All the cases that have been decided upon this subject, have proceeded on a ground which does not exist here, namely, that, if the event had happened, there would

[Hood *v.* Pimm.—4 Sim. 101.]

have been no means of compensating the landlord. Here, if the buildings had been burnt down, the landlord might have prevented the tenant from receiving the insurance-money, and would have had a right to have it laid out in reinstating the premises. The court does relieve in a case in which there was no period during which the landlord would not have had a compensation. In Reynolds *v.* Pitt, 2 Pri. 212, note,* and Rolfe *v.* Harris, 2 Pri. 206, the leases were short, and the value of the reversion might have been an object to the lessor. In this case, it is admitted that the value of the reversion formed no part of the consideration for the lease. The rent was the principal object of the deed, and that was, at all times, sufficiently secured. Sloman *v.* Walter, 1 Bro. C. C. 418.

Mr. Knight, for the defendant, was stopped by the court.

The Vice-Chancellor:—I have a perfect recollection of the case of Reynolds *v.* Pitt. It was first decided in the Court of Exchequer. The same point came before the Master of the Rolls, and his decision was affirmed by the Lord Chancellor. I was counsel in the cause throughout. I remember that Lord Eldon, when he delivered his judgment, gave a minute analysis of all the cases in which a Court of Equity relieves against breach of covenant, and laid it down that the court would not relieve, except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been in, if there had been no breach. In this case there has been a wilful breach of covenant. It is strange to say that the irregularity was caused by the neglect of the landlord in not requiring to see the policies. He could not have had notice, until the breach was committed, even if he had applied to see the policies; and, therefore, his not having done so does not excuse the breach. In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be, under the covenant. My opinion, therefore, is, that the order *nisi* for dissolving the injunction must be made absolute.

Hood *v.* Pimm.

4 *Simons*, 101.

The plaintiffs sued as devisees of A.: but omitted to prove his will: and the bill was dismissed. They afterwards presented a petition of re-hearing, and moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, and the will not being the subject of dispute in the cause.

December 15, 1830. January 10, 1831.

IN May, 1823, the plaintiffs, together with the defendant Potter, filed a bill against the defendant Pimm, for the specific performance of an

* See also 19 Ves. 134.

[Hood *v.* Pimm.—4 Sim. 101.]

agreement dated in May, 1822, by which the plaintiff Hood, together with Potter and John Welch deceased, agreed to sell, to Pimm, a piece of ground, in Derby, and Pimm agreed to sell to Hood, Welch and Potter, another piece of ground in the same town.

The bill, after setting forth the agreement, stated the death of Welch, and his will dated in December, 1822, and executed and attested so as to pass freehold estates, whereby he devised, to the plaintiffs Shaw and Trafford, amongst other real estates, the plot of ground which he, together with Hood and Potter, had agreed to purchase of Pimm, and appointed the plaintiffs Shaw, Trafford, and Henry Welch executors of his will.

In November, 1823, Pimm put in his answer to the bill. In January, 1824, the bill was amended, by striking out Potter's name as a plaintiff and making him a defendant, and in other respects. Pimm and Potter afterwards put in their answers to the amended bill. In July, 1824, and June, 1827, the bill was again amended, and answers were put in to the amendments. The answers insisted that various acts had been done, both by Welch and Potter, which amounted to a waiver of the agreement; and Pimm further insisted that he had been induced to enter into the agreement through a mistake.

Witnesses were examined, on both sides, relative to the waiver, or abandonment and mistake. The cause was heard in June, 1830, when, in consequence of the plaintiffs having omitted to prove John Welch's will, the bill was dismissed with costs, but without prejudice to the plaintiffs filing a new bill. The plaintiffs then presented a petition of re hearing, stating that the will was not proved, solely through the mistake and inadvertence of their counsel. The cause having been ordered to be re-heard, a notice was given, by the plaintiffs, that, on the day appointed for the re-hearing, they should move the court for liberty to file interrogatories to prove the due execution of the will, and that the cause might stand over for that purpose. This motion was supported by an affidavit, of the plaintiffs, stating that the objection for want of proof of Welch's will, was first raised by Potter's counsel; that, by the original bill to which Potter was a co-plaintiff, the will was stated to be (as in fact it was) duly executed; that, though there was no admission, yet there was no denial, of that fact, in the answers; that the plaintiffs' counsel, in November, 1826, had advised, amongst other things, the will to be proved, but when he prepared interrogatories for the examination of witnesses, which was not until February, 1829, he, through mistake and inadvertence, considered that it was not necessary to prove it: that the plaintiffs were willing to make Welch's heir a party to the suit, if the court should think it more advisable, than to allow them to exhibit interrogatories to prove the will.

Sir E. Sugden, Mr. Treslove, and Mr. Cooper for the plaintiffs:

There is a great difference between allowing a party to prove a written instrument, and allowing him to prove his case: for, in the latter case, there is danger of perjury, but not in the former. The due execution of the will is merely a collateral point in this cause: it is merely a link of the plaintiffs' title. The main question in the suit is the binding nature of the contract. The defendants do not deny the due execution of the will; they say only that they know nothing about it. Potter was, originally, a co-plaintiff; and, consequently, he joined with the other plaintiffs in

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asserting that the will was duly executed. Can he be allowed to object that the plaintiffs have not proved what he not only never disputed, but joined with them in asserting? If, upon the hearing of a cause before your Honour, a plaintiff has omitted to prove a fact put in issue, and he afterwards appeals to the Lord Chancellor, his lordship would, upon a petition being presented to him, allow the plaintiff to prove that fact. This is a re-hearing before the same judge; and, therefore, the granting of the indulgence is less objectionable than in the case of an appeal.

All difficulty may be surmounted, by making the heir at law of Welch a party, which the plaintiffs undertake to do if your Honour thinks that that is the better course. Bloxton *v.* Drewit, Prec. Chan. 64; Attorney-General *v.* Thurnall, 2 Cox. 2; Bank *v.* Farquharson, 1 Dick. 167; S. C. Amb. 145; Moons *v.* De Bernales, 1 Russ. 301; Abrams *v.* Winshup, 1 Russ. 526; Wallis *v.* Hodgson, Ibid, 527, note; Cox *v.* Allingham, Jac. 337; Lechmere *v.* Brasier, 2 J. & W. 287; Hartley *v.* Ikin;* Walker *v.* Symonds, 1 Mer. 37; Dashwood *v.* Lord Bulkeley, 10 Ves. 230; White *v.* Fussell, 1 V. & B. 151; Buckmaster *v.* Harrop, 13 Ves. 456; Cholmondeley *v.* Clinton, 2 Mer. 81; Sandford *v.* Paul, 3 Bro. C. C. 370; Williamson *v.* Hutton, 9 Pri. 187; Greenwood *v.* Parsons, 2 Sim. 229; Coley *v.* Coley, 2 Young & Jer. 44.

(The Vice-Chancellor:—In the cases that have been cited, there had been either some attempt made to prove the fact, or the application for leave to prove it was made before the hearing: but neither the one nor the other has been done in this case.)

The Solicitor-General and Mr. Skirrow, for the defendant Potter:

The plaintiffs have the remedy in this case, in their own hands; for the bill has been dismissed without prejudice to their filing a new bill. Now what are the cases cited for the plaintiffs? In Bloxton *v.* Drewit an order was obtained to prove a deed *vivâ voce:* but, in this case, the instrument sought to be proved is a will, which does not admit of being so proved. In Bank *v.* Farquharson the instrument was capable of being proved *vivâ voce;* and one of the witnesses was dead, and the other was out of the jurisdiction. In The Attorney-General *v.* Thurnall, the will was two hundred years old, and, therefore, would have proved itself: and the only thing sought to be proved was a copy of the entry of the will, in the registry-book of the Ecclesiastical Court. In Moons *v.* De Bernales, letters of administration were produced; so that a clear case was made for letting in proof that the person to whom the administration was granted, was dead. In Abrams *v.* Winshup, the court knew that the will existed, and that it had been duly executed and attested, and the only point remaining to be proved was the sanity of the testator. Here there has been no attempt made to prove the will; and the court does not know that there is such an instrument in existence. Cox *v.* Allingham is totally different from the present case. It was the case of a lease, which was capable of proof as an exhibit. When the cause came on to be heard, the lease was in court, but it was afterwards lost. It was admitted, by the answers, and referred to when produced. Hartley *v.* Ikin was also the case of an instrument which was provable as an exhibit; and it was admitted by the executors. The court, therefore, had judicial

* Decided by Sir John Leach, but not reported upon this point.

cognizance of the instrument: and all that the court did, was to admit further proof of it to be given. The court there made a decree, in the first instance, to bind the personal estate only; and reserved the real estate for a future decree. Here a decree is asked once for all.

Mr. Knight and Mr. Wigram for the defendant Pimm:

The plaintiffs Shaw, Trafford and Henry Welch claim an interest, in the matters in question in this cause, as devisees of John Welch deceased, who was one of the original contracting parties. They have no interest except as his devisees, and they have neither proved, nor attempted to prove, that they sustain that character. They appear before the court as mere strangers.

It is said, however, that the defect may be remedied, either by allowing the plaintiffs to exhibit an interrogatory to prove the will of John Welch, or by allowing the plaintiff to amend the bill and make the heir at law of John Welch a party, who, it is said, is now a plaintiff on the record, and will admit the will. In support of the above propositions, cases have been referred to. We deny that the present case is within the principle of any of those cases.

1. This is not a case in which the court will allow the plaintiff to perfect his case by further evidence.

Bloxton *v.* Drewit and Bank *v.* Farquharson do not appear to have been opposed cases. In The Attorney-General *v.* Thurnall, the will was two hundred years old; and, therefore proved itself. That, moreover, was a charity case, in which great liberality was formerly shown. In all those cases the indulgence was allowed in the regular progress of the cause, and not, as in this case, with a view to a re-hearing.

The last observation applies also to Cox *v.* Allingham, Abrams *v.* Winshup, and Moons *v.* De Bernales.

Cox *v.* Allingham and Abrams *v.* Winshup are distinguishable from this case on another ground. In both those cases the plaintiff had examined the proper witness to prove his whole case, and the only defect in the evidence was that the examination had not been carried quite far enough. But, as the defendant, in those cases, might have cross-examined the witness upon the defective point, it would have been too much to have allowed him to insist on the defect as a ground for dismissing the suit altogether. It is observable that the difficulty in those two cases arose, in a great measure, from the peculiar mode of taking evidence in equity. At law the witness would have been recalled; and, therefore, in those cases, the court only put itself in the situation of a Judge at *Nisi Prius*, when it permitted the witness to be re-examined.

In Moons *v.* De Bernales the court went a great way, further perhaps than in any other case. But, in that case, the letters of administration, though not legal evidence of the death of Arnoldy, proved that a court of competent jurisdiction had made a decree, which must have proceeded exclusively upon evidence of his death.

In Coley *v.* Coley the will was proved by one witness, and was therefore sufficiently proved for all the purposes of the suit, except that of establishing it against the heir.

In Cutten *v.* Sanger,* the whole case turned upon the insolvency of a

* Not reported as to this point. See a report of the case upon the hearing, 2 You. & Jer. 459.

[Hood *v.* Pimm.—4 Sim. 101.]

party; strong *primâ facie* evidence was given of his insolvency; but the court thought it not proved in fact, and refused an inquiry or further evidence.

In Barfield *v.* Kelly, 4 Russ. 355, the plaintiff's case was founded on an agreement, which one of the defendants impeached by his answer. The plaintiff proved the agreement, as an exhibit, *vivâ voce* at the hearing. This he could not do as against the party who impeached it, because it excluded the opportunity of cross-examining the attesting witnesses. In that case there had been many interlocutory proceedings in the cause, all founded upon the agreement; but the Master of the Rolls dismissed the bill.

Barfield *v.* Kelly, which is according to the modern practice of the court, displaces Bloxton *v.* Drewit and Bank *v.* Farquharson. Indeed, the observations of Sir Thomas Plumer in Cox *v.* Allingham, and the extreme hesitation with which, in that case, and in the case of Abrams *v.* Winshup, the further evidence was allowed, would have been superfluous, if the right which the plaintiffs claim were a matter of course, according to the cases of Bloxton *v.* Drewit and Bank *v.* Farquharson. The statement of those cases is too short and imperfect to admit of the court acting upon them as authorities.

In the remaining cases cited for the plaintiffs, the application, as in the present case, was to produce new evidence, with a view to a re-hearing of the cause. The true distinction is laid down in Williams *v.* Goodchild, 2 Russ. 91; namely, that, on a re-hearing, such additional evidence only is admissible as the party was in a situation to have used at the original hearing. New evidence can only be adduced under very special circumstances. In Williams *v.* Goodchild it was refused. In Dashwood *v.* Bulkeley, Walker *v.* Symonds, Williams *v.* Hutton and Wyld *v.* Ward, 2 Young & Jer. 381, the point was reserved by the terms of the orders allowing the new evidence to be gone into. The evidence, in those cases, consisted merely of exhibits, which were to support some part of the case on the record, and not, as in this case, of the parol evidence of a witness who was to prove a leading fact in the cause.

II. The second mode proposed by the plaintiffs for remedying the defect, is as objectionable as the first. The case is not that which they make by the bill. The court has no evidence before it that the person alleged to be the heir of Welch, really sustains that character, and the defendants are not, at this stage of the cause, to be put to defend a new case.

The Vice-Chancellor:—This is a case of importance, and so many cases have been cited, that I shall take time to consider of it before I decide.

January 10.—The Vice-Chancellor:—It appears from the affidavit, that the error in not proving Welch's will, arose from the mistake of counsel. At the original hearing, the plaintiffs had gone through their case when the objection was taken by the defendant's counsel, and, as it could not then appear how the error happened, and the plaintiff had risked the hearing of the cause, it seemed right to me that the bill should be dismissed. But the cause now comes on for re-hearing, with the motion supported by affidavit.

There is an abundance of cases to show that, uniformly, from the

[Hood *v.* Pimm.—4 Sim. 101.]

earliest times, Courts of Equity have relieved against mere errors of examiners, commissioners, witnesses, solicitors and counsel, and, when there has been an accidental defect in evidence, have, before the hearing, at the hearing, and at the re-hearing of a cause, allowed the defect to be supplied. In Bloxton *v.* Drewit, Prec. in Cha. 64, an order was made to prove a deed *vivâ voce*. It turned out that the attesting witnesses were dead, and leave was given, at the hearing, to prove the deed. In Spence *v.* Allen, Prec. in Cha. 493, after depositions had been suppressed, because they were leading, which was the error of counsel, leave was given to file new interrogatories; and a similar leave was given in the case of Lord Arundel *v.* Pitt, Amb. 585. In the case of Griells *v.* Gansell, 2 P. W. 646, a deposition had been taken, erroneously, by the examiner, or through mistake of the witness, and leave was given to correct the mistake. And in two instances, in the case of Kirk *v.* Kirk, 13 Ves. 280—285, where witnesses had made mistakes, the mistake was corrected, in one instance, on the application of the defendant, in the other, on the application of the witness. In Shaw *v.* Lindsay, 15 Ves. 380, and in Ferry *v.* Fisher, Ibid, 382, there cited, the court relieved against the error of commissioners in taking depositions; and, though it suppressed the erroneous depositions, directed the witnesses to be examined over again. In Lord Cholmondeley *v.* Lord Clinton, 2 Mer. 81, where the intention to examine witnesses properly, and, by mistake of the solicitor, an error happened, the court relieved; and Lord Eldon said he was clear the court had an undoubted right to rectify a mere slip in its proceedings. Lord Eldon indeed says, in Willan *v.* Willan, 19 Ves. 590: "After publication, previous to a decree, you cannot examine witnesses further, without great difficulty, and the examination is generally confined to some particular facts." But this shows Lord Eldon's opinion that leave might be given in a proper case. In Wallis *v.* Hodgson, 2 Atk. 56; 1 Russ. 526, note, Lord Hardwicke, after he had gone through the hearing of a cause, postponed it, and gave leave to exhibit interrogatories to prove the sanity of the testator. It appears, from the report, 2 Atk. 56, that he thought it a mere matter of form. In Bank *v.* Farquharson, Amb. 145; S. C. 1 Dick. 167, Lord Hardwicke, before the hearing of a cause, adjourned it, in order that a deed might be proved, which could not be proved merely as an exhibit. In Sandford *v.* Paul, 3 Bro. 370, Lord Thurlow, on motion before the hearing, where a mistake had happened, allowed a witness, who had been examined, to be re-examined. In The Attorney-General *v.* Thurnall, 2 Cox, 2, on motion at the hearing, leave was given to enter into further evidence, so as to let in the copy of a will. In Walker *v.* Symonds, 1 Mer. 37, n., leave was given, on a re-hearing, to read exhibits not proved at the hearing. In Cox *v.* Allingham, Jac. 337, upon petition, after the hearing, leave was given to enter into new evidence, as to the loss of a deed, so as to let in evidence of a copy. In Moons *v.* De Bernales, 1 Russ. 307, and Abrams *v.* Winshup, 1 Russ. 526, upon application in the course of the hearing, leave was given to enter into further evidence as to the death of a person and the sanity of a testator: and in Williams *v.* Goodchild, 2 Russ. 91, Lord Eldon expressed an opinion that, on a re-hearing, upon special application, new evidence might be received. In Williamson *v.* Hutton, 9 Price, 187, the Court of Exchequer permitted a re-hearing on the ground of new evidence, discovered since the hearing, and gave leave, not merely to prove exhibits *vivâ voce*, but to exhibit interrogatories to prove them.

[Nayler *v.* Wetherell.—4 Sim. 114.]

In Coley *v.* Coley, 2 Young & Jerv. 44, the Chief Baron, when the cause was set down for hearing, gave leave, on motion, to examine two further witnesses to a will, when one only had been examined; and though in Wyld *v.* Ward, 2 Young & Jerv. 381, he would not allow proof of the lease at the re-hearing, unless it could be proved as an exhibit, his reason seems to have been that he thought the omission to prove it at the hearing arose from mere neglect, not accident, but blameable neglect.

The counsel for the defendants have relied upon two cases, Lechmere *v.* Brasier, 2 Jac. & Walk. 287, which seems to me to have no relation to the point before the court, and Barfield *v.* Kelly, 4 Russ. 355, upon which case it is to be observed that no application was made to postpone the hearing, in order that the deed might be proved as against Nicholson, and, it not being proved against him, the bill was properly dismissed.

In the present case, the instrument proposed to be proved, is not, strictly, a mere exhibit, capable of being proved *vivâ voce*, but it is very little more. Its due execution, though not admitted by the answers, was not denied. It is not the subject of dispute in the cause. It is merely a formal link in the plaintiff's title, and it happened, only through the slip of counsel, that it was not duly proved. My opinion, therefore, is that the petition of re-hearing must stand over to a distant day, and that, in the meantime, leave must be given to exhibit interrogatories to prove the will, and the plaintiffs, who are the petitioners, must pay the costs of this application, and the costs of the day on the former hearing.

Nayler *v.* Wetherell.

4 *Simons*, 114.

A. by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage, equally: some of the children of the marriage died in the lifetime of A. and his wife: Held, that under this covenant, all the children became entitled to vested interests, on their coming into existence: and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate) having, by his will, given both his real and personal estates to the same persons, some of whom exclusively claimed the real estates, under the covenant, a case of election arose.

December 22, 1830. January 12, 1831.

BY the settlement on the marriage of Thomas Blunt with Mary Hoskyns, dated in August, 1768, after reciting that T. Blunt was not then enabled to make any settlement on his wife or the issue of their intended marriage, he covenanted, with the trustees of the settlement, that if the intended marriage should take effect, he would, by his will, or otherwise, in his lifetime, well and effectually give, bequeath, settle, convey and assure all such messuages, lands, tenements and hereditaments, whether freehold, leasehold, copyhold or customary, goods, chattels and personal

estate, of what nature or kind soever, as he, at or immediately before the time of his death, should be seised, possessed of, or entitled to, either at law or in equity (subject nevertheless to the payment of his debts, contracts, engagements and funeral expenses,) so that such messuages, lands, tenements and hereditaments, goods, chattels and personal estate might be held possessed and enjoyed, by the said Mary Hoskyns, for her life, in case she should survive him, and, after the decease of the survivor of them, then by all and every the child and children issue of the marriage, and his, her and their several and respective heirs, executors, administrators or assigns, according to the respective natures of such estates, in equal shares, if more than one, as tenants in common, and, if but one such child, then by such only child, his or her heirs, executors and administrators.

There was issue of the marriage six children, of whom the defendant Harriet Blunt alone survived her father. Frances, another of the children, intermarried with Richard Nayler, and left three sons, the plaintiff, Charles Nayler, and the defendants, George Richard Nayler and Thomas Nayler, of whom the plaintiff was the eldest. The other four children of Thomas and Mary Blunt died intestate and unmarried, and their father took out letters of administration to their effects. Thomas Blunt died in 1809, having, by his will, without in any manner alluding to the covenant in his marriage settlement, bequeathed his personal estate to his wife for life, and, after her decease, to his daughter Harriet Blunt and the plaintiff and defendants G. R. Nayler and Thomas Nayler: and he devised all his messuages, lands, tenements and hereditaments to trustees, in trust, as to one moiety, for the same three persons, and, as to the other moiety, for Harriet Blunt and her future husband, for their lives, and, after the death of the survivor of them, for their issue: and he appointed four persons, of whom the defendant Wetherell was the survivor, the executors of his will. Richard Nayler, the plaintiff's father, died in 1816; and the defendant Wetherell was also the surviving executor of his will. Mrs. Blunt died some years after her husband.

The bill charged that T. Blunt's will was executed without a knowlege of the settlement, and that the whole real and personal estate of which the testator was seised or possessed at his death, was bound by the covenant therein contained, and that the will, inasmuch as it differed from the settlement thereby covenanted to be made, must be entirely disregarded, and treated as a nullity: that, under the covenant contained in the settlement, the plaintiff and his brothers were entitled to one moiety of the testator's personal estate, and Harriet Blunt to the other moiety; and that the plaintiff was entitled, in fee simple, to one moiety of the real estates of which the testator died seised, and Harriet Blunt to the other moiety, in fee simple. The bill prayed that the settlement of 1768 might be established, and that the covenant therein contained might be carried into effect so far as the deaths of parties would permit; and that the shares of the plaintiff and of the defendants G. R. Nayler and Thomas Nayler and Harriet Blunt, in the testator's real and personal estates, might be conveyed and made over to them; and, if the legal estate in the real estates, was vested in the defendant Wetherell, who was the surviving trustee of the will, that he might be decreed to convey the same to the persons entitled thereto.

Mr. Treslove and Mr. Steuart, for the plaintiff, said that the covenant was not to have its full operation till the death of the covenantor, and, consequently, that all the property which he had at that time, including

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what he was entitled to as the administrator of his children, was bound by it.

Mr. Spence, for the defendant Harriet Blunt, said that, under the covenant, no child of the marriage who did not survive the covenantor, could be entitled to any of the property agreed to be settled: and that, as Harriet Blunt alone survived her father, she was entitled to the whole of the property which he had at his death.

Mr. Whitemarsh and Mr. Walker, for the defendants, G. R. Nayler and Thomas Nayler,

Contended that every child of the marriage, as it came into existence, took a vested interest in the property: that the shares which the father took as administrator to his children, having been once subjected to the operation of the covenant, could not be again affected by it, but that, as to those shares, the covenant was satisfied: that, if the covenant was to have the effect contended for by the other parties, the real estate would have to be divided differently from the personal estate; and if one or more of the children had released their father from the covenant, the others would take the whole of the property: that the covenant could not apply to that property which had resulted from the operation of the covenant: that the parties who claimed under the covenant, could not claim under the will also, but must be put to their election: that the testator had four shares of his personal property to dispose of, and had assumed to himself to dispose of his real estates, which he could not do, as they were all bound by the covenant: that, to raise a case of election, it was not necessary that the real estates should be devised specifically, but that a general devise was sufficient, Wall *v.* Bright, 1 J. & W. 494; that all that was required was, that it should appear, on the face of the will, that the testator intended to dispose of something which he had no power to dispose of: that the legal estate in all the testator's real property, had passed by the will, and the persons for whom he had provided, by his will, were the same as those who were entitled under the covenant: that, in Read *v.* Crop, 1 Bro. C. C. 492, and Blommart *v.* Player, 2 Sim. & Stu. 597, a case of election did not arise, because the estates did not pass by the will.

Mr. Treslove, in reply, said that, to raise a case of election, it must clearly appear that the testator intended to devise property which he had no right to dispose of: that, if he had given specific farms, the intention would have been manifest, but that it was not so, where the testator disposed of all his lands, generally: that it did not appear, by the will, that the testator had any recollection of the covenant, and, therefore, that he could not have intended to defeat it. Byas *v.* Byas, 2 Ves. 164; Forrester *v.* Cotton, 1 Eden, 532; S. C. Amb. 388; Deg *v.* Deg, 2 P. W. 412; Rutter *v.* Maclean, 4 Ves. 531; Judd *v.* Pratt, 15 Ves. 390; Blommart *v.* Player, 2 Sim. & Stu. 597.

Mr. Walker said that Deg *v.* Deg did not apply, as, in that case, an attempt was made to put a creditor to his election, but here the parties were all claiming under the same will.

Mr. Lovat appeared for the defendant, Wetherell, and Mr. Stuart for the other defendants, who were incumbrancers on the share of G. R. Nayler.

The Vice-Chancellor:—With respect to the construction of the covenant, I am of opinion that all the children of Thomas and Mary

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Blunt took vested interests, as they came into existence, subject to open, and let in others subsequently born. The covenant is in these words: [His Honour here read the covenant.] A court of Equity, in executing this agreement, would consider that it had no power to modify it, but that the persons to take under it must be the same, and that the property must be taken in the same manner as if that which was agreed to be settled, had been actually settled; and, if this covenant had been carried into effect under the decree of a Court of Equity, the court would have directed the property to be settled in such a manner as that each of the children would have taken a vested interest *ab initio*. Any other construction of this covenant would be open to this difficulty, that, if the father, on the marriage of a child, had, in partial execution of the agreement, settled on that child its share under the covenant, and the child had died in its father's life-time, the settlement would have been void. The property cannot admit of perpetual subdivisions, according to the contingencies of the children dying in their father's life-time; but there must be a division once for all. When a child once became entitled to a share, that share cannot be considered as again liable to the operation of the covenant; but when it has once become vested, it cannot be divested by any subsequent event. The construction contended for by Mr. Spence, would give to the children larger interests than they took at their births; and, if a child had assigned his share to his father, the assignment would have been inoperative.

As to the question of election. This testator was not seised of any real estates which were not subject to this covenant: and consequently his will could have no operation, unless it operated upon them. I know of no case that decides that, where a testator is not a mere dry trustee, but has entered into a covenant which binds his real estates, the legal estate in them will not pass by his will. The consequence is, that the will operates on all the estates of which this testator was seised, and the legal interest in them passes to the devisees: and, therefore, I am of opinion that this is a case of election.

"This court doth declare that the covenant contained in the indenture of release, bearing date the 2d day of August, 1768, bound all the freehold, leasehold, and copyhold estates and personal estate belonging to Thomas Blunt, and which he had power to dispose of by will; and this court doth declare, that all the six children of Thomas Blunt took vested and equal shares in such freehold and copyhold estates as tenants in common, in fee, and in his leasehold and personal estate, as tenants in common, absolutely. And this court doth declare that the plaintiff and the defendant Harriet Blunt became entitled to the last-mentioned freehold and copyhold estates, as tenants in common in fee, the said defendant Harriet Blunt taking one-sixth part thereof, in her own right, and a moiety of four-sixths parts thereof, as the joint heiress at law of her brother and sisters who died unmarried, and the plaintiff taking his moiety thereof as the heir at law of his mother, Frances Nayler, deceased. And this court doth declare that the said defendant Harriet Blunt became entitled to one-sixth part of the said last-mentioned leasehold and personal estates in her own right. And this court doth declare that the said Frances Nayler deceased became, and that the plaintiff and the defendants George Richard Nayler and Thomas Nayler, as her children, are entitled to another sixth part of the said leasehold and personal estate. And this court doth declare that the said Thomas Blunt, since deceased,

became entitled to the other sixth parts of the said leasehold and personal estates as personal representative of his unmarried children who died in his life-time, and that they were bequeathed by his will and passed as therein directed. And this court doth declare that the said Thomas Blunt, having given by his will all his freehold and copyhold estates to the same persons as he had bequeathed his personal estate, the persons entitled under the covenant contained in the said indenture of release to his freehold and copyhold estates, cannot claim under and against his will, and that they must elect either to give up the real estates which they take by virtue of the covenant, or the personal estate which they take by virtue of the will."

Handfield *v.* Woolley.

4 *Simons*, 122.

UPON a motion made, by Mr. Dickson, for a Sergeant-at-Arms, under 11 Geo. 4. and 1 Will. 4. c. 36, s. 15, rule 1, the Vice-Chancellor ruled that the affidavit thereby required, must be made by the clerk who issued the attachment, and that the town agent must join in the affidavit, swearing as to his belief.

December 6, 1830.

Cliffe *v.* Wilkinson.

4 *Simons*, 122.

Where the plaintiff is out of the jurisdiction, a defendant is at liberty to require the security of solvent persons to be given, for costs.

A plaintiff resident out of the jurisdiction, allowed to pay 120*l.* into court, in lieu of giving security for costs in the usual manner.

December 13, 1830. January 20, 1831.

THE defendants had obtained an order that the plaintiff, who was resident in Scotland,* might give security for costs, and that, in the meantime, all proceedings in the suit might be stayed. The plaintiff afterwards proposed the security of two persons, named Potter and Matthison, who were objected to, by the defendants, as not being solvent persons.

The Solicitor-General and Mr. E. Montagu, for the defendants, now moved that the plaintiff might be ordered, within ten days from the date of the order to be made on the motion, to give security for the costs of the suit, according to the course of the court, in the room of, or in addi-

* See Ker *v.* Duchess of Munster, Bunb. 35.

tion to Potter and Matthison, who had been already objected to on behalf of the defendants, and who, as the defendants were advised, were wholly insufficient for that purpose; or, in default thereof, that the bill might be dismissed with costs.

The motion was supported by affidavits, from which it appeared that Potter and Matthison were not solvent persons.

Mr. Pepys, Mr. Knight and Mr. Reynolds, for the plaintiff, said that the application was unprecedented, and that the court required personal security only.

The Vice-Chancellor:—There is, I apprehend, no rule of the court which prevents my attending to the question as to the sufficiency of the security for costs proposed to be given, by a plaintiff, in cases like the present: and, upon consideration of the affidavits, I am of opinion that the two persons who have been proposed are not solvent persons, and that their security ought not to be accepted.

January 20.—Mr. Knight moved, upon notice given before the expiration of the time limited by order made, in this cause, on the 13th December last, that the plaintiff might be at liberty to pay 100*l.* into court, in lieu of giving security for the costs. He said that the security required by the court was limited to 100*l.*; and that Sir Anthony Hart, V. C., though he had ordered, in Camac *v.* Grant, 1 Sim. 348, that the bill should be dismissed, in case the defendant should make default in giving security for costs, had afterwards expressed doubts as to his being warranted in making the order.

Sir E. Sugden and Mr. E. Montagu for the defendants.

The Vice-Chancellor said that, if the plaintiff would increase the sum offered, so as to bear the expense of bringing the money into court, and of getting it out again, he would grant the motion.

The order made was that, upon the plaintiff bringing into court 120*l.* within a week, and paying the costs of this and the former application, the bill should be retained, otherwise that it should be dismissed.

Brattle *v.* Waterman.

4 Simons, 125.

THE 15th order does not apply to an amendment, by adding parties only.

January 10, 1831.

Barr *v.* Wiggins.

4 *Simons*, 125.

A SOLICITOR whose bill had been taxed, and more than one-sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the court granted an injunction to restrain the action.

December 10, 1830.

Wheatley *v.* Slade.

4 *Simons*, 126.

A. being etitled to nine-sixteenths only of an estate, agrees, by mistake, to sell the entirety to B. *Semble*, that a specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially where C. has a lien on the estate for a debt which would exhaust nearly the whole of the purchase-money.

December 20, 1830.

IN April, 1830, the defendants Slade, Stephens, and Studley, agreed to sell, to the plaintiffs, a lace manufactory, situate at Crewkerne, in Somersetshire, for the remainder of a term of nine hundred and ninety-nine years, for 12,200*l.* Upon the title being investigated, it appeared that those defendants were entitled to nine-sixteenths only of the manufactory, and that the other defendant, Samuel Sparks, was entitled to the remaining seven-sixteenths, as the administrator of Samuel Sparks his late father, and that he also had a lien on the entirety of the property agreed to be sold, for the sum of 10,000*l.* and interest, due to his father's estate.

The bill was filed for a specific performance of the agreement: it charged that the defendant, Samuel Sparks, was privy to and concurred in the sale; and that, therefore, he ought to join with the other defendants in assigning the entirety of the premises to the plaintiffs: or, at all events, that the plaintiffs were entitled to have an assignment made, to them, of the nine-sixteenths of which the other defendants were possessed, upon their paying, to those defendants, a proportionate part of the 12,200*l.*: that the defendants had lately entered into a negotiation with J. G. Draper, for the sale to him of the premises. The bill prayed for an assignment of the entirety of the premises, freed from all debts, liens, and liabilities: but, if the plaintiffs should not be entitled thereto, then that the defendants Slade, Stephens and Studley, might assign, to the plaintiffs, all their estate and interest therein, freed as before mentioned, the plaintiffs being willing to pay, to them, a fair proportion of the

12,200*l.*; and that the defendants might be restrained from selling, or agreeing to sell, the premises, to any other person.

An injunction having been obtained *ex parte*, a motion was now made to dissolve it. The defendants Slade, Stephens and Studley, by their affidavit, said that they entered into the agreement with the plaintiffs, under a mistaken notion that they were possessed of the entirety of the premises; and they, as well as the defendant Sparks, denied that the contract was entered into with his privity or concurrence.

Mr. Pepys, Mr. Jacob, and Mr. Wright, for the defendants, in support of the motion.

Mr. Knight and Mr. Parker, for the plaintiffs, relied upon Hill *v.* Buckley, 17 Ves. 394.

The Vice-Chancellor:—In Hill *v.* Buckley it was decided that a purchaser might file a bill, and insist on having the agreement performed as far as the vendor was capable of performing it, and that a deduction should be made, to him, in respect of the deficiency: but that is not allowed where a large portion of the estate cannot be conveyed.

In this case, the defendants Slade, Stephens and Studley, agreed to sell the lace manufactory, to the plaintiffs, for 12,200*l.* under the impression that they were possessed of the entirety of it. But it afterwards appeared that they could make a title to nine-sixteenth shares only of the property, and that it was subject to a debt of 10,000*l.* and interest, which would exhaust nearly the whole of the purchase-money. It appears, therefore, that I have not before me such a case as will justify me in continuing the injunction; as the court, at the hearing, would not deal with this case as it dealt with Hill *v.* Buckley.

Injunction dissolved.

Jones *v.* Wattier.

4 *Simons*, 128.

PLAINTIFF sets down a plea to be argued: and afterwards moves that it may not stand in the paper, and gets an order to amend his bill. The defendant is entitled to taxed costs.

December 23, 1830.

Woodgate *v.* Unwin.

4 *Simons*, 129.

Bequest to A. for life, and, after her decease, to her children, when they arrived at 21: A. had two children, both of whom attained 21: Held, that they were tenants in common.

January 17, 1831.

JOHN UNWIN, by his will, gave to his daughter Mary Cooke, the wife of John Cooke, the interest of 2500*l.* stock, for her life, and, after her decease, the capital to her children, when they arrived at the age of 21 years. But, should she die childless, then he directed that 1000*l.* part of the 2500*l.* should be transferred to her husband, John Cooke, and that the remainder should become the property of his, the testator's, children.

Mrs. Cooke had four children, namely, the plaintiff Mrs. Woodgate, John Cooke, James Cooke, and George Cooke. The two last died infants, in the testator's lifetime. John Cooke survived the testator and attained 21; but died in his mother's lifetime. She died in February, 1830, leaving Mrs. Woodgate her only surviving child; who claimed, by her bill, to be entitled to the whole of the stock.

Upon the argument of a demurrer to the bill, the questions were: 1st. Whether John Cooke took a vested interest in a moiety of the stock: 2d. Whether a joint-tenancy or a tenancy in common was created by the will.

Sir E. Sugden and Mr. Turner in support of the demurrer:

It may be taken for granted that John Cooke took a vested interest in the stock. The only question that admits of argument is, whether the will created a joint-tenancy, or a tenancy in common. In order to create a joint-tenancy, there must be a unity in point of time and in point of interest. "If lands be demised, for life, the remainder to the right heirs of J. S. and of J. N. J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time," Co. Litt. 188, a. Here the legatees must all take at different times. Suppose that a child had attained 21 and died; his interest would be transferred to another child, who might never become entitled, and never take even a vested interest; for the survivor might then be of the age of 15, and might die at 16. So if a child had died under 21, nothing could have survived to another child who had attained 21. There is, therefore, no unity either of time or of interest; and, consequently, Mrs. Woodgate and her brother, J. Cooke, took as tenants in common.

Mr. Moore, for the plaintiff, in support of the bill, said that there were no words of severance in the bequest: and that the children took vested interests at one and the same time, but their shares were not payable till 21.

The Vice-Chancellor:—It is contrary to the rule of law, that persons who are to take at different times, can take as joint-tenants. To

make them take as joint-tenants, the property must vest at once. From the necessity of this case, the children, who attain 21, must take as tenants in common.

Robinson *v.* Cooper.

4 *Simons*, 131.

If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound and the will need not be proved.
March 28, 1831.

THIS was a suit to carry into execution the trusts of a will relating both to real and personal estate. One of the defendants, who was the heir at law of the testator, by his answer, admitted the will; but before the will was established by the decree of the court, that defendant died, and the suit was afterwards revived against his heir, who was adult.

On a petition in the cause coming on to be heard, praying that part of the real estates might be sold, Mr. Simons, for the plaintiff, stated the above facts, and submitted to the court whether, under the circumstances of the case, it was necessary for the plaintiff to prove the will, in the usual manner, before it could be established.

No counsel appeared for the heir of the testator, against whom the suit had been revived.

Mr. Rolfe appeared for the other defendants, and said that, as the original heir of the testator had admitted the will, the derivative heir was bound by the admission, and, consequently, that it was not necessary to prove the will *per testes:* and of that opinion was the Vice-Chancellor.*

Lock *v.* Foote.

4 *Simons*, 132.

If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved.
January 19, 22, 1833.

IN this case the question as to the necessity of proving the will, arose under circumstances similar to those in the preceding case, except that the derivative heir was an infant.

Mr. Rolfe appeared for the heir, and cited Sleeman *v.* Sleeman, 2 Dick. 787, and Cartwright *v.* Cartwright, Ibid. 545.

Mr. Treslove, *amicus curiæ*, said that the same point had come before

* See the next case.

[Lock *v.* Foote.—4 Sim. 132.]

Sir John Leach, Master of the Rolls, in Livesly *v.* Livesly, when the two cases above-mentioned were cited; and that, notwithstanding the second heir, in his answer to the bill of revivor and supplement which was filed against him, disputed the validity of the testator's will, his Honour held that the circumstance of the first heir having admitted that will, rendered it unnecessary to prove it against the second heir.

The Vice-Chancellor expressed himself to be of the same opinion as the Master of the Rolls, and doubted the correctness of the report of the cases in Dickens; but said that he would direct search to be made for them in Reg. Lib.

January 22.—On this day the Vice-Chancellor said that he had referred to the entries of the cases of Sleeman *v.* Sleeman and Cartwright *v.* Cartwright, in Reg. Lib.: that, with respect to the former (which was before Lord Bathurst, C.) no such thing as was mentioned by the reporter appeared to have taken place, but, the original heir having admitted the will, the court established it: and, with respect to the latter, (which was before Lord Thurlow, C.,) the first heir having, by his answer, admitted the will, died, leaving an infant heir: and all that was stated in Reg. Lib. was that, on hearing the will and proofs read (not saying what proofs) the court declared that the will ought to be established: and, consequently, that, as to the first case, the reporter was wrong; and, as to the second, it did not appear that he was right.

The following particulars of the two cases above referred to, were extracted from Reg. Lib.:

SLEEMAN *v.* ANGOVE.

William Sleeman, the eldest son and heir at law of the testator, filed his bill, stating the will to have been duly executed, and praying that it might be established, and the trusts of it performed. He died, leaving Robert Sleeman, an infant, his heir at law, against whom a bill of revivor was filed.

The decree was thus prefaced: "Whereupon and upon debate of the matter, hearing the will of the said testator Robert Sleeman, dated the 15th day of May, 1749, read, and what was alleged by the counsel on both sides, and it appearing, to the court, that William Sleeman, one of the plaintiffs in the original cause, who was heir at law of the said testator Robert Sleeman, and devisee of one moiety of the said testator's real estates, had acted under his father's will, and submitted to the devises thereby made, for upwards of twenty years, and had joined, in an additional mortgage of the estates, with his brother Thomas Sleeman, the devisee of the other moiety: His lordship doth declare that the will of the said testator Robert Sleeman, dated the 18th day of May, 1749, ought to be established, &c."—Reg. Lib. B. 1771, fol. 315.

CARTWRIGHT *v.* CARTWRIGHT.

This was a suit to have a will established and the trusts carried into execution. The original heir admitted the will, and, on his death, a bill of revivor and supplement was filed against the derivative heir. The

decree commenced as follows: "Whereupon, &c., and upon hearing the will and codicils and proofs taken in this cause read," the court established the will, &c.—Reg. Lib. A. 1774, fol. 778.

Biddle *v.* Perkins.

4 *Simons*, 135.

A power of sale is not void, although the exercise of it is not expressly confined within the line of perpetuity.

April 15, 1829.

MICHAEL COPE HOPTON, by his will, dated the 3d of December, 1802, gave and devised all his manors, messuages, farms, lands, tenements, hereditaments and real estates, in the counties of Surrey and Brecon, or elsewhere, to John Partridge, Thomas Loggen, and the Rev. Joseph Biddle, and their heirs and assigns, to the use of his nephew, the Rev. William Parsons, and his assigns, during his life, remainder to Partridge, Loggen, Biddle, and their heirs, during the life of William Parsons, in trust to preserve contingent remainders, remainder to the use of John Parsons, the eldest son of William Parsons, and his assigns, during his life, remainder to the trustees and their heirs, during the life of John Parsons, in trust to preserve contingent remainders, remainder to the use of the first and other sons of John Parsons, successively, in tail male, remainder to the use of Charles Parsons, the second son of William Parsons, and his assigns, for life, remainder to the trustees and their heirs, during the life of Charles Parsons, in trust to preserve contingent remainders, remainder to the use of the first and other sons of Charles Parsons, successively, in tail male, remainder to the use of William Parsons, the third son of the testator's nephew William Parsons, and his assigns, for life, remainder to the trustees and their heirs, during the life of William Parsons, the son, in trust to preserve, &c., remainder to the use of the first and other sons of William Parsons, the son, successively, in tail male, remainder to the right heirs of William Parsons, the nephew. In the will was contained the following clause: "And I do hereby will and direct, that it shall and may be lawful, to and for the said John Partridge, Thomas Loggen, and Joseph Biddle, and the survivors and survivor of them, and the heirs of such survivor, at any time or times after my decease, at the request, and by and with the consent and approbation of the person or persons who shall, for the time being, be entitled, in possession, to my aforesaid manors, messuages, farms, lands, tenements and hereditaments, in the counties of Brecknock and Surrey, and elsewhere, with the appurtenances, under and by virtue of the limitations herein before contained; and, in case such person or persons shall be an infant or infants, then, at the request and by and with the consent and approbation of his, her, or their guardian or guardians, such consent and request to be signified by any writing or writings to be signed and sealed in the presence of and attested by two or more witnesses, to make sale, and dispose of, or to convey in exchange for or in lieu of other messuages, farms, lands, tenements, or hereditaments of equal or greater value, all or

[Biddle *v.* Perkins.—4 Sim. 135.]

any part or parts of the said manors, messuages, farms, lands, tenements and hereditaments, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or any other equivalent as to them, the said John Partridge, Thomas Loggen and Joseph Biddle, or the survivors or survivor of them, or the heirs of such survivor, shall seem reasonable; and, upon payment of the money arising upon any sale of all or any part of the hereditaments which shall be so sold as aforesaid, to sign and give proper receipts for the money for which the same shall be sold, which receipts shall be sufficient discharges, to any such purchaser or purchasers, for the purchase-money, or for so much thereof as, in such receipts, shall be acknowledged or expressed to be received, and such purchaser or purchasers shall not afterwards be answerable or accountable for any loss, misapplication or non-application of such purchase-money: and I do hereby further will and direct that, when any of the said hereditaments and premises shall be sold for a valuable consideration, and such receipt shall be given for the consideration-money as aforesaid, and also when any of the said hereditaments and premises shall be sold and disposed of, or conveyed in exchange for or in lieu of other messuages, farms, lands, and hereditaments, and the fee simple and inheritance of such other lands shall be vested in the said John Partridge, Thomas Loggen, and Joseph Biddle, or the survivors or survivor of them, his heirs and assigns, all and every the manors, messuages, farms, lands, tenements and hereditaments so sold, disposed of and conveyed pursuant to this present power, shall be and remain, for ever thereafter, freed and absolutely discharged of and from all and every the uses, trusts, powers, provisoes and declarations herein before limited, expressed and declared of and concerning the same, and then and from thenceforth, the said hereditaments and premises so sold and conveyed in exchange as aforesaid, shall remain, enure and be to the only use and behoof of such purchaser or purchasers, or other person or persons to whom the same shall be so respectively sold, disposed of or conveyed, and of his and their heirs, respectively, for ever, or as he or they shall direct and appoint."

The power of sale having become vested in the plaintiffs, Harriet Biddle and Catharine Poole, as co-heiresses at law of the surviving trustee, the testator's estates in Surrey were sold, by them, in exercise of such power, to the defendant, on the 29th of April, 1828, with the concurrence of the Rev. William Hopton (late Parsons) and of his eldest son, the next tenant for life, in remainder. The defendant having been advised that there was some doubt as to the validity of the power of sale, declined completing his purchase, without the sanction of a Court of Equity. The plaintiffs, therefore, in Trinity Term, 1828, filed their bill for a specific performance; and, on the coming in of the answer, the usual order for the reference of the title was obtained. The Master reported in favour of the title. The defendant excepted to the report, alleging that the power of sale was not valid, inasmuch as its operation was not confined within the line of perpetuity.

Sir Edward Sugden appeared for the plaintiffs, in support of the exception.

Mr. Stinton appeared for the defendant.

The object of the parties being merely to take the opinion of the court upon the question raised by the exception, the point was not much discussed.

[Biddle *v.* Perkins.—4 Sim. 135.]

The Vice-Chancellor held that the power of sale was valid, and overruled the exception.*

* *May* 5, 1830.—Powis *v.* Capron.

By the marriage settlement of Mr. and Mrs. Story, dated in 1819, certain premises were conveyed to the Earl of Powis and Henry Clive and their heirs, to the use (after the expiration of a life estate, which expired before the bill was filed) of Mr. Story, for life, remainder to the trustees to preserve, &c. remainder to Mrs. Story, for life, remainder to all and every the child and children of the marriage, as Mr. and Mrs. Story, or the survivor of them, should appoint, and, in default of appointment, to the use of such child or children equally, if more than one, as tenants in common, and of the heirs of the respective bodies of such children respectively issuing, with cross remainders between them, and, if but one child, then to the use of such child, and to the heirs of his or her body, and, in default of such issue, to such uses as Mrs. Story should appoint, with the ultimate limitation to her heirs and assigns. The settlement contained the following power of sale and exchange: Provided, &c. that it shall be lawful for the said Earl of Powis and Henry Clive, and the survivor of them, his heirs and assigns, from time to time, and at all times, at the request, and by the direction, in writing, of the person or persons who, under the limitations hereinbefore contained, shall, for the time being, be entitled to the possession or receipt of the rents and profits of the premises hereinbefore released, or, if such person be under age, with the consent of his or her guardian during minority, to make sale, &c. of the said settled premises. The power contained the other usual provisions. The trustees made a sale under the power; but the title was objected to on the ground mentioned in the above case, and the purchaser refusing to complete, Mr. and Mrs. Story and their trustees, the Earl of Powis and Henry Clive, in March, 1829, filed their bill to compel a specific performance. The usual reference of title having been obtained, the Master reported in favour of the title; to which report an exception was taken.

The exception came on to be argued on the 5th of May, 1830, before the Master of the Rolls. The defendant's counsel, Mr. Tinney and Mr. Morley, were heard in support of the exception: but his Honour, without hearing the plaintiff's counsel, expressed his opinion, strongly, against the objection: he declined however to decide the point, and added that, if the defendant insisted on the objection, a case must be made for the opinion of a court of law. The defendant having declined to take a case, the exception was overruled; and the defendant afterwards completed his purchase.

The same question came again before the Master of the Rolls in Hil. Term, 1833, upon an exception taken to the Master's report, in Waring *v.* Coventry: and his Honour, after hearing the counsel in support of the exception, overruled it. See Sir Edward Sugden's observations on Ware *v.* Polhill, 11 Ves. 257; Treat. Pow. 148, 149.

Warner *v.* Armstrong.

4 *Simons*, 140.

IF a plaintiff gives a notice of motion, and dies before it is made, and his executors revive, the court will not give the defendants the costs as of a motion abandoned.

February 26, 1831.

Newton *v.* Reid.*

4 *Simons*, 141.

Testator gave a sum of money for the separate use of his daughter, a *feme sole;* and declared that she should not be at liberty to sell or dispose of it, and, if she attempted so to do, that such sale should be void. The daughter afterwards married: Held, that the restraint on alienation was void, there being no gift over.

December 21, 1830.

CHARLES NEWTON, by his will, bearing date the 7th of January, 1800, directed his trustees to make a just and true calculation of the amount of all his property arising from the sale of his real estates, and getting together of all his personal estate, and to divide the same into seven equal parts, one equal seventh part of which he gave to his daughter, Mary Newton, for her own sole and separate use and benefit, first reserving thereout a sufficient sum to purchase an annuity of 50*l.* for the life of his daughter, Mary Newton, which he directed his trustees to hold in their names, from time to time, during the life of his daughter, and to pay and apply the same, half yearly, into the proper hands of his daughter, whose receipt alone, from time to time, notwithstanding any husband she might thereafter have, should be a sufficient discharge, it being his express desire that the annuity should not be subject to the debts, management, control, will or engagements of any husband she might have, but that she should not be at liberty, in any way whatever, to sell, assign, or in any way dispose of the annuity, or, if she did do so, he declared such sale void and of no effect, his intention being, if any accident in life should unfortunately happen to her, that she should be kept from want. And he gave unto his daughter Ann Newton, one other seventh part of all his property, for her own use and benefit, to be paid to her on her attaining the age of twenty-one years, and, in the meantime, the interest to be applied to her use by his trustees, and, in case of the death of his said daughter, Ann Newton, under the age of twenty-one years, having a child or children lawfully begotten, then he directed the seventh part of his property, so given to his daughter Ann,

* *Ex relatione*, Mr. Turner.

[Newton *v.* Reid.—4 Sim. 141.]

to be paid and applied, equally, between such child or children, on his, her, or their attaining the age of twenty-one years: but he further willed and desired that the said seventh part or share should likewise be subject and liable to a sufficient sum that the trustees should purchase another annuity of 50*l.* per annum, for the life of his daughter Ann, which he directed his trustees to pay to her, half yearly, on the same express terms and conditions as thereinbefore particularly mentioned respecting his daughter Mary, it being for the very same reasons so given to her.

Ann Newton married George Appleton: and, by an indenture dated the 8th February, 1821, in consideration of 270*l.* then due and owing, by Appleton, to William Sikes, John Watson, Henry Sikes, and Thomas Wilkinson, and of the further sum of 250*l.*, paid by them to Appleton, he and his wife assigned, to W. Sikes, J. Watson, H. Sikes and T. Wilkinson, all the sum and sums of money, chattels and effects whatsoever of and belonging to George Appleton and Ann his wife, or to which they, or either of them were, or should thereafter become entitled, under the said will, upon trust for securing the repayment of the two sums of 270*l.* and 250*l.* with interest. By another indenture the further sum of 1000*l.* was secured to Sikes & Co. in like manner.

Under the proceedings in the cause the several sums of stock following, that is to say, in bank three per cent annuities 1843*l.* 6*s.* 0*d.* in new 3½ per cent annuities, 552*l.* 2*s.* 11*d.*, and, in cash, 386*l.* 7*s.* 5*d.* were carried over to "Ann Appleton's annuity and residuary account." A petition was presented, by Appleton and his wife, insisting that the restrictions contained in the will against the sale and disposition of the annuity of 50*l.*, for the life of Ann Appleton, were void, and of no effect, and stating that they were desirous that such annuity should not be purchased, and praying that the 1843*l.* 6*s.* 0*d.* bank three per cent annuities, and 552*l.* 2*s.* 11*d.* 3½ per cent annuities might be sold, and the proceeds, with the cash standing to the same account, applied in payment of Sikes's debt, and the residue paid to George Appleton.

Mr. Turner for the petitioners, cited Barton *v.* Briscoe, Jac. 603.

Mr. Swann for the trustees.

The Vice-Chancellor held, that the annuity not being given over upon alienation, the restrictions were void; and ordered according to the prayer.

Tyler *v.* Lake

4 Simons, 144.

By a deed declaring the trusts of the proceeds of real estates, the share of a married daughter of the grantor was directed to be paid into her proper hands, for her own use and benefit, and the same words were used in declaring the trusts of the shares of the grantor's sons: Held, that the married daughter was not entitled to her share, for her separate use.

January 13, 1831.

BY indentures of lease and release of the 9th and 10th of August, 1825, Catherine Tyler conveyed certain real estates to trustees, upon certain trusts during her life, and, after her decease, in trust to sell and dispose of the same, and to stand possessed of the money to arise from such sale, in trust to pay off certain incumbrances, and the costs and expences of the sale, and to divide and distribute the surplus between and amongst or for the benefit of her sons and daughters, John Tyler, since deceased, the plaintiff, Catherine the wife of John Cooke, the defendants Betty Maria the wife of John Gottlieb Anthony, Barbara the wife of Thomas Brown then Barbara Tyler, William Tyler, Mary Jane Tyler, and the plaintiffs Caroline Tyler and Caroline Ann Tyler, if all of them should be then living, in equal parts and proportions, but subject to the limitations, declarations, and directions thereinafter contained concerning the same respectively (that is to say) as to the shares of Catherine Cooke and of Betty Maria Anthony respectively, in trust to pay the same into their own proper hands, to and for their own respective use and benefit, in case they should respectively be living at the time of the decease of Catherine Tyler, or the time of payment or distribution of the said moneys; but, in case they or either of them should have departed this life, then the shares or share of them, or such of them as should have so died, to be paid to their respective husbands, John Cooke, and John Gottlieb Anthony, if then living, to and for their own respective use and benefit, absolutely: but, in case J. Cooke and J. G. Anthony, or either of them, should also have died, leaving lawful issue by their said respective wives, their shares, or the share of such of them as should have died leaving lawful issue, should go and belong, and be paid unto, between and amongst all their children, or other lawful issue, equally, as tenants in common respectively; and, in default of any such lawful issue, then to such person or persons as should, at the time of their respective deceases, be the respective next of kin, or lawful personal representatives of Catherine Cooke and Betty Maria Anthony, respectively, under the statute for the distribution of the estates and effects of persons dying intestate. And, as to the shares of Barbara, the wife of Thomas Brown, Mary Jane Tyler, Caroline Tyler and Caroline Ann Tyler, whether they, or any or either of them should be or have been married, or not, at the time of the decease of Catherine Tyler, upon trust to lay out and invest the same upon the usual securities, in the names of the trustees, and to stand possessed of such securities in trust to pay and apply the interest, dividends and annual proceeds thereof, from time to time, as the same should become due and payable, unto the said

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Barbara Brown, Mary Jane Tyler, Caroline Tyler, and Caroline Ann Tyler, respectively, or their respective appointees or assigns, to and for their own proper and respective use and benefit, or otherwise as they should, from time to time, by any writing under their respective hands, direct, for the terms of their respective natural lives; and, from and after their respective deceases, then as to the shares of Barbara Brown and Mary Jane Tyler respectively, and also the share of Caroline Ann Tyler, in case she should have attained the age of 21 years at the time of the payment or distribution of the said trust-moneys, in trust to pay, apply and dispose of the same, or any part thereof, unto such person or persons, and at and in such manner, time and form, as they, by their respective last wills and testaments, or any codicil or codicils thereto, to be executed and attested as therein mentioned, should appoint, whether they should then be covert or sole; and, in default of any such appointment by them, or either of them respectively, then, as to their respective shares, or, as to so much thereof whereof no such appointment should be made, or, as to the share of Caroline Ann Tyler, in case she should die under the age of 21 years, upon trust to pay and distribute the same, respectively, unto and amongst all and every such one or more, and other and others of the children of Catherine Tyler, as should be living at the time of the respective deceases of the said Barbara Brown, Mary Jane Tyler and Caroline Ann Tyler, in equal shares, as tenants in common, or to the respective husbands (if living) of such of them being daughters, as should have departed this life, or to the lawful issue of such daughters, if any, whose husbands should have also departed this life, in like manner as was before directed concerning the shares of Catherine Cooke and Betty Maria Anthony respectively, upon their respective deceases; and, in default of there being such husbands or issue of any such surviving daughters, then, as to the respective shares of Barbara Brown, Mary Jane Tyler and Caroline Ann Tyler respectively, so dying intestate, in trust for their respective next of kin, or lawful personal representatives, under the statute of distribution as aforesaid. And, as to the share of John Tyler, upon trust to invest the same in the names of the trustees, upon the usual securities, and to pay and apply the dividends, interest and annual proceeds thereof, as and when the same should become due and be payable, unto the said John Tyler, for his own proper use and benefit, during his natural life, or to such person or persons, and in such manner as he, by any writing under his hand, should, at any time or times, and from time to time, appoint, and in default of any such appointment, to invest the same, in the like or other securities, in order that the same might accumulate and become principal money and carry interest, during his life; and, after his decease, then as to his share in the said trust-moneys and securities, and also as to the share of Caroline Tyler, after her decease, in trust to pay, apply and dispose of the same respective shares in such manner as was before directed concerning the shares of Catherine Cook, Betty Maria Anthony, Barbara Brown, Mary Jane Tyler and Caroline Ann Tyler respectively, upon their respective deceases, in case of and under the events and contingencies before-mentioned or provided for in that behalf, on the happening of the same or any of them respectively, or as nearly thereto as the difference of sex (as to the share of John Tyler) and other subsisting circumstances, for the time being, would permit. And, as to the share of William Tyler, in trust to pay the same into his proper hands for his own use and benefit, in case he should be living at the time of the decease of Catherine Tyler; and,

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in case he should have died in the lifetime of Catherine Tyler; or before the time of payment or distribution of the trust-moneys, then upon the trusts therein mentioned.

Mrs. Tyler died on the 1st of January, 1829.

The suit was instituted for the purpose of carrying the trusts of the settlement into effect. The Master having, in the course of the cause, found that, under the settlement, Mrs. Anthony was entitled to her share of the trust moneys, for her separate use, the assignees of Mr. Anthony (who had become bankrupt) excepted to the report.

Sir E. Sugden, Mr. Knight and Mr. Campbell, for the assignees, in support of the exceptions:

It is clear that the gift made to Mrs. Antony, is not a gift to her separate use. There is no intervention of trustees; and absolute, and not life interests are given; and all the gifts over are substitutionary. The words: "into their own proper hands, for their own use and benefit," are used emphatically only. That that is the true construction, is proved by the subsequent part of the settlement. The settlor uses the same words in declaring the trusts of William Tyler's share. In the next place, the instrument on which the question arises, is a deed, and not a will, and, consequently, the court will require the intention of the donor to be clearly and formally expressed. The words are as applicable to a man as to a woman. In limitations in old deeds, the words commonly used were: "To the use of A. B. for his own proper use and behoof.", In Prichard *v.* Ames, 1 Turn. & Russ. 222, the question arose upon a will, and the decision turned upon the expression, "at her own disposal;" which words do not occur in this case: and it was held that those words showed it to be the intention of the testatrix that Mrs. Prichard should have a power of disposal which the law did not give her. Wills *v.* Sayers, 4 Madd. 409; Roberts *v.* Spicer, 5 Madd. 491; Lee *v.* Prieaux, 3 Bro. C. C. 381; Lumb *v.* Milnes, 5 Ves. 517.

Mr. Pepys and Mr. Girdlestone, Jun. for the defendant, Mrs. Anthony, in support of the report:

Here the whole property is vested in trustees, and Catharine Tyler, the settlor, must have intended, by using all these words, to give the property to Mrs. Anthony's separate use, otherwise they would be superfluous. In the event of the wife being alive, nothing is given to the husband. If she were dead, then, and then only, the share is given to the husband. The author of the gift has said that the husband should have it, only, in case the wife were dead. Because useless words are used in one gift, are they not to have their proper meaning where they are properly used? In the gift to William Tyler, the words mean that, if he is alive, his share is not to be fettered with any trust.

One of the cases referred to, is Lumb *v.* Milnes. There the trust was to pay the interest, to Elizabeth Milnes, simply, for her life. It was a simple gift of an annuity.

Wills *v.* Sayers is no authority as to the effect of the words, "for her own use and benefit," standing by themselves, for the testator had shown, in a prior part of the will, that he knew how to give property for the separate use of the legatee. In Roberts *v.* Spicer, it is impossible not to see that the Vice-Chancellor decided on the same ground as in Wills *v.* Sayers. The circumstance of the testator knowing how to give property

to the separate use of a married woman, is important where words are used, in another part of the will, which are ambiguous.

In Hartley *v.* Hurle, 5 Ves. 540, the intention of the testator, in using the words, "into her hands for her own use and benefit," was not evidenced by any impression that occurred in any other part of the will, but the Master of the Rolls decided that those words, taken by themselves, gave the property to the testator's grand-daughter, for her separate use.

In the course of the argument in support of the report, the Vice-Chancellor observed that personal property possessed by a husband in his marital right, was very different from property given to him in case his wife should be dead; for, if the wife had contracted debts *dum sola*, and, upon her death, the husband took out letters of administration to her, he would be bound to pay those debts out of the property which he took as her administrator.

At the conclusion of the argument his Honour delivered judgment as follows:

There is no decision that a mere gift of a sum of money to be paid into the proper hands of a married woman, is a gift for her separate use, except the case of Hartley *v.* Hurle: but, in that case, there was no argument on the point.

Supposing that it were ambiguous, in this case, what is the meaning of the words which have been relied on, the will itself has given us a power of construing them; for it must be supposed that the settlor intended the same in one gift as in the other. Now, in the gift to William Tyler, the settlor has used the same words as in the gift to Mrs. Anthony; but it cannot be supposed that she intended, by using those words, to give him any peculiar power over the property which he was to take, except what is implied in the gift; and, therefore, I am bound to say that, in the gift to Mrs. Anthony, those words are to be taken as mere words of gift, and not as conferring on her any peculiar power over the property. The consequence is that the Master's report, so far as it finds that the property was given to her separate use, is wrong.

Exception allowed.

Stocken *v.* Stocken.

4 *Simons*, 152.

By the settlement on the second marriage of A. his intended wife's father settled estates on himself for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage; and the trustees were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children during their minorities; and A. covenanted to permit his intended wife to enjoy any future property that might accrue to her, for her separate use; and her father covenanted that all the personal property he should die possessed of, should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions,

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qualifications or charges, that he might make by his will. The father died, having bequeathed his residuary estate to A. and appointed him his executor. A. entered into possession of the settled estates, and received the rents and mixed them with his own moneys. There was issue of the marriage two children. A. maintained them at his own expense, and died, having, by his will, given them benefits in real estates which it was alleged he had purchased, in part, with the rents of the settled estates: Held, that A. was a purchaser of the trust for the maintenance and education of the children, and that his executors were entitled to be allowed, in account, the sums which it would have been proper to apply for those purposes: that the covenant by the father of the wife was a provision against intestacy only: that the sums due from A. to his children, being a debt, were not satisfied by the benefits given them by his will; but an inquiry was directed as to what part of the real estates devised for their benefit, had been purchased, by A., out of the rents of the settled estates.

January 21, 1831.

BY the settlement on the second marriage of William Stocken with Mary Ann Bettesworth, certain leasehold estates were assigned, by John Maslin Bettesworth, the lady's father, to two trustees, of whom John Simpson was the survivor, subject to the life interests of John Maslin Bettesworth and his wife, upon trust for the separate use of Mrs. Stocken, for her life, and, after her decease, upon trust for the children of the marriage, equally as tenants in common, and to be assigned and transferred to them at their respective ages of twenty-one; and, in case all the children should die under twenty-one, then in trust for W. Stocken, his executors, administrators and assigns; and the trustees were directed, after the death of the survivor of Mr. and Mrs. Bettesworth and Mrs. Stocken, to apply the rents and profits, at their discretion, for the maintenance and education of the children, during their minorities. And William Stocken covenanted that he would permit Mary Ann Bettesworth to enjoy, for her separate use, as well the property thereby assigned, as any future or other property which should accrue to her, either from her father, or any other person. And J. M. Bettesworth covenanted that all the goods, chattels and effects which he should die possessed of or entitled to, should, upon his decease, be settled upon M. A. Bettesworth, for her separate use, during her life, and, after her decease, for the benefit of all her children, equally, in the same manner as the premises thereby assigned were settled for their benefit: "subject only, nevertheless, and without prejudice to any other dispositions, qualifications or charges which J. M. Bettesworth should or might make, by his last will and testament, of or concerning the same, or any part thereof." In the covenant against incumbrances contained in the settlement, a mortgage for 500*l.* and a further charge of 100*l.*, created by J. M. Bettesworth, were excepted.

Mr. and Mrs. Bettesworth died in the lifetime of Mrs. Stocken.

Mr. Bettesworth, by his will, after bequeathing a legacy of 100*l.* gave the residue of his estate and effects, after payment of his debts, legacies, and funeral and testamentary expenses, to William Stocken, and appointed him his executor. Stocken proved the will; and, after paying the testator's debts and the legacy of 100*l.* appropriated the residue to his own use.

Mrs. Stocken died in September, 1812, leaving her husband and two infant children, Francis M. Stocken and M. A. Stocken surviving her. Upon her death, Simpson, the surviving trustee, who did not appear to

be then accurately acquainted with the contents of the settlement, inquired of Mr. Stocken whether it would be necessary for him to take any steps with respect to the leasehold property, the subject of the settlement: and, being answered in the negative, he permitted Mr. Stocken to enter into, and continue in possession of the leasehold premises, till his death. Stocken kept no accounts of the rents which he received, but mixed them with his own moneys.

Mr. Stocken died in 1824, leaving his two children, who were still infants, surviving him; and having, by his will, dated the 1st November, 1823, given them considerable benefits, partly in pecuniary legacies, and partly by devises of real estates, and he devised and bequeathed, to Oliver Thomas Joseph Stocken, his son and heir by a former marriage, other portions of his real and personal estate, and gave to him all the residue of his estate and effects, and appointed him, together with the other defendants King and Dawson, executors of his will.

Shortly after the death of Mr. Stocken, Mr. Simpson discovered a copy of the settlement, and, having been advised upon its effect, he applied to the executors to have the leasehold property given up to him; and he was, accordingly, let into possession of it.

In June, 1826, the bill was filed by Francis Maslin Stocken, Mary Ann Stocken, and Simpson, against the executors of Mr. Stocken, who were also the devisees in trust of the estates devised for the benefit of the infant plaintiffs, praying, among other things, for an account of the rents and profits of the settled estates received, by William Stocken, in his life, and, after his decease by his executors, and for an account of Bettesworth's residuary estate, and that what should be found due, on the taking of such accounts, might be declared to be a debt due from William Stocken's estate, and to be payable with interest.

The defendants, by their answer, admitted that W. Stocken had received the rents of the leasehold estates, and mixed them with his own moneys, and that he had kept no accounts; but they alleged that he had paid off the mortgage and further charge upon those estates, and laid out a part of the rents in the purchase of a portion of the estates devised to the infant plaintiffs, and that he had maintained and educated them at his own expense; and they claimed to have allowances made to them in respect of the sums so paid and laid out, and also in respect of William Stocken having maintained and educated the infant plaintiffs, although they admitted that he was of ample ability so to do.

Mr. Spence and Mr. Goodeve, for the plaintiffs, contended that W. Stocken having been of ability to maintain and educate his children, he was not entitled to any allowance for what he had expended for those purposes: that the plaintiffs were entitled to an inquiry as to the circumstances under which the mortgage and further charge had been paid off; and to an account of J. M. Bettesworth's residuary estate, as being bound by the covenant in the settlement.

Sir E. Sugden and Mr. Koe, for the defendants:

First. The defendants are entitled to an inquiry, as to what would have been a proper allowance for the maintenance of the infant plaintiffs, and to have the amount deducted from the sum received on account of the rents. The settlement was made on the second marriage of Mr. Stocken. It was part of the contract that the rents should be applied in

maintaining the children of that marriage; and Mr. Stocken was entitled, as a purchaser, to the benefit of that trust: Mundy *v.* Earl Howe, 4 Bro. C. C. 223, is a conclusive authority upon this question; and, if anything were wanting for the purpose, the covenant under which Mr. Stocken gives up the after-acquired property of his wife, completes the resemblance between the two cases.

Secondly. We do not object to the inquiry as to the circumstances under which the mortgage and further charge were paid off: but there ought also to be an inquiry as to what part of the rents received by Mr. Stocken, was expended by him in the purchase of the devised estates.

Thirdly. The infant plaintiffs are not entitled to any thing, under Bettesworth's covenant. He bequeathed his residuary estate to Mr. Stocken, which he was at full liberty to do, for, by the covenant, that part only of his property as to which he should make no other disposition, was to be settled upon the trusts of the settlement. The covenant was merely a provision in case of intestacy.

Fourthly. The benefits given to the plaintiffs under their father's will, are to be taken as a satisfaction, *pro tanto*, of what may be found due, from his estate, in respect of the rents which he received, and mixed with his own moneys. Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516.

Mr. Spence, in reply:

I. This case does not fall within the principle of Mundy *v.* Earl Howe. There the father purchased the benefit of the trust, by giving up the fortune of his wife, which, but for that, would have belonged to him, and enabled him to maintain his children. It is obvious, that the consideration for what the father relinquished, was the appropriation of the fund in relieving him from the burthen. Here, the father had nothing to give up; for the fund in question came, not from the lady, but from the lady's father, and therefore, the marriage alone would have given him no title to it. The provision, in the settlement, as to the property to be thereafter acquired, by Mrs. Stocken, depended upon a mere contingency: besides, that could not have made Mr. Stocken a purchaser of the trust for applying the rents of the leasehold property for the maintenance of his children; and there is nothing, therefore, to constitute him a purchaser of that benefit. The provision was the mere bounty of the lady's father. But even admitting that Mr. Stocken, if an application had been made to the court in his lifetime, would have been entitled to an allowance for his children's maintenance, none can be made at this distance of time. *Ex parte* Darlington, 1 Ball & Beatt. 240.

II. The defendants are not entitled to an inquiry as to whether any part of the rents of the settled estates was expended in the purchase of the devised estates. The allegations of the defendants in that respect, destroy themselves, since they state Mr. Stocken to have mixed the rents with his own moneys, and to have kept no accounts. How is it possible then that they should be ear-marked. There is not only, therefore, no evidence of the expenditure, but the evidence tends the other way.

III. The construction put upon Bettesworth's covenant, is irrational. The object of the qualification was, simply, to give the covenantor a power of varying the distribution among objects of the covenant. The wife and children were purchasers for valuable consideration; and, therefore, if doubt exists, a construction favourable to their interests must be

adopted.* But, in reality, no doubt can exist. The words, "qualifications and charges," not only admit of the meaning which we contend for, but distinctly import it. The word, "dispositions," being found in juxta-position to those words, ought to receive an analogous interpretation. Every stipulation in a deed should receive a construction consistent with its general object; and the general object of this settlement, was to make a provision for the wife and children, which the construction contended for on the other side, would defeat.

IV. With respect to the claim of the children in respect of the rents, being satisfied by the benefits given to them by their father's will, the rule relied on applies only to cases where a father is bound, by covenant or otherwise, to provide portions for his children. Hinchcliffe *v.* Hinchcliffe is a case of that description. The receipt of the trust-moneys, in the present case, constitutes a debt; and that furnishes the distinction. Tolson *v.* Collins, 4 Ves. 483.

The Vice-Chancellor:—With respect to the question of maintenance, it is quite clear that Mr. Stocken, notwithstanding he was of ability to support his children, would have been entitled, under this settlement, to have an adequate portion of the rents applied for their maintenance and education; and, therefore, it ought to be now ascertained what sums were proper to be allowed for those purposes; and the defendants must have credit, in account, for the amount.

Independently of the covenant by Mr. Stocken having the effect of giving up the after-acquired property of his wife, the case would fall, precisely, within Mundy *v.* Earl Howe: and I should so have decided it, even if that covenant had been wanting. The consideration of marriage alone, constituted the father a purchaser; and the benefit of the trust was part of his contract. The covenant identifies the two cases completely.

With respect to Mr. Bettesworth's covenant, it had no other effect than to prevent an intestacy. It is quite clear that Mrs. Stocken and her children were to take, in the event only, of his making no other disposition.

The moneys owing, from Mr. Stocken to his children, being in the nature of a debt, the benefits given them by the will are not to be considered as a satisfaction: but there should be an inquiry, to ascertain whether any portion of the property given by the will, was derived from the rents of the leasehold estates.

* See Bristow *v.* Warde, 2 Ves. jun., 347.

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4 *Simons*, 161.

A plea to a bill of discovery in aid of an action, which confesses and avoids some of the facts stated in the bill as the grounds of the action, and traverses others, will be overruled.

January 21, 29; March 6, 1831.

IN 1822 the constitutional government of Spain being desirous of raising a loan, the Cortes authorized 40,000,000 of rials, in rentes or annuities, at the rate of five per cent per annum, to be inscribed in the great book of the public debt of Spain, and to be sold at the best price that could be obtained. The Spanish government afterwards contracted with Bernales & Nephews of London, for the negotiation of the sale of the rentes or annuities; and, accordingly, bills of exchange were drawn, by the agent of the Spanish government, in favour of the treasurer-general of Spain, upon, and accepted by Bernales & Nephews, and were negotiated, upon the credit of the rentes, in favour of various persons who advanced the value thereof to the government. But Bernales & Nephews not having paid a considerable number of such bills when due, the King and Cortes, by a decree of the 16th May, 1823, authorized the government to carry into effect any contracts that its commissioners in London had made, for the whole or part of the 40,000,000 of rials, and to issue and negotiate such part of the 40,000,000 rials as might be necessary to cover the bills negotiated; and certain persons named Alzaybar, Loredo, Sierra, and Martinez, were appointed commissioners for carrying the decree into effect.

In July, 1823, the commissioners appointed the defendants Lubbock & Co., and Campbell & Co., of London, to be their agents in the issuing and negotiating of part of the 40,000,000 of rials: and, thereupon, an agreement, dated the 18th of July, 1823, was made, between Lubbock & Co., and Campbell & Co., of the one part, and the commissioners of the other part, and, after reciting that the Cortes, in order to provide for the payment of the bills of exchange which had been dishonoured by Bernales & Nephews, had directed inscriptions to be issued for 580,000 dollars, and 24,000 dollars of rentes of five per cent per annum, and the proceeds to be applied in payment of the bills of exchange, and that the commissioners had received instructions, from their government, to proceed, (with the agency and assistance of Lubbock & Co. and Campbell & Co.) to the payment of the dishonoured bills, and that, for those purposes, the said two inscriptions of rentes had been transmitted, by the minister of finance, as the authority, to the commissioners, to grant certificates as after mentioned, and that the commissioners had determined to issue certificates, upon the credit of those inscriptions, for various sums bearing interest at five per cent per annum, payable half-yearly: It was agreed as follows:

Art. 1. That the commissioners should, upon the credit and authority of the inscriptions, issue and sign certificates of different amounts from twenty-five dollars to four hundred dollars rentes, bearing interest at five per cent per annum, payable to bearer; and that the interest or dividends

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thereon should be made payable at the counting-house of Campbell & Co., but Campbell & Co. were not, in any manner, to guarantee or become responsible for the payment thereof, further than the sums which might be placed in their hands for that purpose; and that Campbell & Co. should be paid such commission for making such payments, as therein mentioned.

Art. 2. Martinez (who had been authorized to superintend the payment of the bills of exchange, and who, for that purpose, had been intrusted with the two inscriptions of 580,000 dollars and 24,000 dollars rentes) thereby authorized the commissioners to sign and deliver the certificates, upon the credit and authority of the inscriptions, to Lubbock & Co. and Campbell & Co., who thereby bound themselves to deliver the certificates, to the holders of the bills of exchange, according to the respective amounts thereof, and Martinez was to sign his approbation of the sums to be paid to each holder of the bills.

Art. 3. That, in addition to the certificates to be issued, by the commissioners, for providing for the payment of the bills, the commissioners agreed to issue and deposit, with Lubbock & Co. and Campbell & Co., such further sum in certificates as should be requisite to raise, by the sale thereof, a sum sufficient to pay two half-years' interest, on the first-mentioned certificates, to commence from the 1st of May, 1823, and to be payable, by Campbell & Co., on the 1st of November, 1823, and the 1st of May, 1824.

Art. 4. That the defendants should be at liberty to sell the certificates which should be issued to defray the first year's interest, on rendering punctual accounts of the sale thereof to the commissioners, or, in their absence, to the Spanish minister of finance.

Art. 5. That, the commissioners should allow, to the defendants, for managing and negotiating the business agreed to be transacted, a commission of four per cent.

Art. 7. That the defendants should be at liberty to act as agents and correspondents of any of the holders of the bills, and to receive, in those characters, the certificates in which such bill-holders were entitled.

Art. 8. That, during the period which might elapse in preparing and signing the certificates by the commissioners, the defendants should, with the assistance and concurrence of Martinez, employ themselves in liquidating and ascertaining the sum in certificates to be paid to each holder of bills, and arranging the number and amount of certificates to be delivered in satisfaction of each claim, and that Martinez should sign a duplicate of each account, as the authority for the defendants to deliver, to the persons giving up the bills, the corresponding amount in certificates.

Art. 9. That the defendants engaged, out of the money they should receive upon the sale of certificates, to pay the commissioners the expenses incurred by them in the execution of their commission; and that the defendants should not, in any manner, or for any purpose, become liable, in any part of the negotiations and transactions thereby agreed upon, to pay, either to the commissioners, or to any of the bill-holders, any sum of money whatsoever, further or otherwise than what should be received by them upon the sale of certificates, deducting the commission thereby stipulated to be paid to them.

The bill after stating as above, alleged that, in pursuance of the contract, Martinez delivered, to the defendants, divers certificates of rentes, to the amount, in the whole, of the two inscriptions, of 580,000 and

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24,000 dollars of rentes: That, at the time of making the contract, the plaintiff was a creditor of the Spanish government, to the amount of 2000*l.*, and was, under the decree and contract, entitled to receive, from the commissioners, certificates of 1500 dollars of rentes; and that, accordingly, certificates of rentes to that amount, were delivered, by the defendants, to the plaintiff, in satisfaction of his claim: that, in addition to the certificates so delivered to the defendants, the Spanish commissioners also delivered, to the defendants, pursuant to the 3d Art. of the contract, various other certificates of rentes, amounting to 125,000 dollars of rentes, to the intent that the same might be negotiated and disposed of, by the defendants, and the produce thereof applied in payment of the two first half-yearly dividends which should become due on the certificates of 580,000 dollars and 24,000 dollars of rentes: that, upon the certificates for the 125,000 dollars of rentes being delivered to the defendants, they, by an instrument in writing, dated the 29th of August, 1823, admitted that they had received and held those certificates upon trust and for the purpose of negotiating the same and applying the produce in payment of the two first half-yearly dividends on the first-mentioned set of certificates: that the defendants immediately sold the whole of the second set of certificates; and that, out of the produce thereof, they paid the holders of the first set of certificates the first half-yearly dividend thereon, and that, after making such payment, the defendants had, in their hands, a surplus of the produce of the sale of the second set of certificates, more than sufficient for the payment of the remaining half-yearly dividend on the first set of certificates: that the defendants, notwithstanding they realized a sufficient sum for payment of the whole of the first year's interest on the first set of certificates, and had expressly contracted to pay the same, and were, by reason thereof, personally liable, to the holders of the last-mentioned certificates, for the first year's interest thereon, had refused to pay, to the holders of the last-mentioned certificates, the other half-year's interest thereon, and, although the defendants received and held the money produced by the sale of the second set of certificates for the use of the holders of the first set of certificates, and as money specifically appropriated to the payment of the first year's interest thereon, yet they had wrongfully converted a part of such produce to their own use: that the defendants had, from time to time, been themselves the purchasers of a considerable number of the certificates, and had frequently speculated in the purchase thereof, for the sake of keeping up the market price thereof, and that they then held a large number of the certificates which had been bought by them; and that they had used part of the residue of the money arising from the sale of the second set of certificates, for the purchases of certificates so made by them, and otherwise, for their speculations and private purposes, and that, by reason thereof, they delayed and evaded payment of the remaining half of the first year's interest on the first set of certificates: that the plaintiff had commenced an action, in the Court of Common Pleas, against them, for the remaining half of the first year's interest on the certificates held by him, as being money had and received, by the defendants, to the use of the plaintiff. The bill charged that the defendants ought to set forth an account of all sums of money received, by them, on account of the sale of the second set of certificates, and that the defendants had, in their custody, divers accounts, &c., the examination and production of which would enable the plaintiff to prove his case at law.

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The bill prayed for a discovery in aid of the action, and for a production of the documents, in the usual manner.

To this bill the defendants, Lubbock & Co., put in the following plea: That, in and previous to May, 1823, and from that time until after the date and execution of the agreement of the 18th of July, 1823, the Cortes of Spain exercised certain authority in that country, by virtue of the constitution of the kingdom of Spain; and that, during all that period, the government of that country was called the constitutional government: that, in the month of May, 1823, Alzaybar, Loredo and Sierra, were appointed, by the said constitutional government, commissioners and agents, for the purpose of issuing such certificates of rentes as in the bill mentioned, and, at or about the same time, Martinez was appointed, by the said constitutional government, its agent, to superintend and control the issuing of such certificates, and to direct the application and disposal thereof, and of the proceeds of such of them as should be sold; and that, soon after the date and execution of the agreement, of July, 1823, Martinez and the commissioners delivered to these defendants, and to Campbell & Co., as agents, for the purpose of applying and issuing the same under the direction and control of Martinez, the first set of certificates of rentes, and on or about the 29th of August, 1823, Martinez and the commissioners delivered, to these defendants and to Campbell & Co., as such agents as aforesaid, the second set of certificates of rentes, for the object of the same being negotiated and sold by the defendants and by Campbell & Co., under the superintendence and control of Martinez, and the produce thereof applied to the payment of interest, conformable to the said agreement; and that, thereupon, these defendants and Campbell & Co. did, for the purpose of acknowledging the receipt of the second certificates, and not for the purpose, or with the view of declaring any trust in favour of any of the holders of the bills of exchange, or any of the holders of any certificates, give a receipt to Martinez and the commissioners, in the words and figures following, viz:

"We have received from Don Antonio Martinez, Don Manuel M. Alzaybar, Don Winceslas de Sierra, and Don José Loredo, Spanish commissioners, the certificates specified hereunder, amounting together to 125,000 hard dollars of rentes, for the object of their being negotiated, and the produce applied to the payment of interest, commissions and charges, conformable to the contract entered into on the 18th of July, 1823. We to hold, at the disposal of the Spanish government, any surplus of amount that may arise.

"Series:

"Q.	263	certificates of	300 dollars each of rentes, - -	78,900
"O.	1	ditto	100 - - - - - -	100
"P.	230	ditto	200 - - - - - -	46,000
				125,000"

That the first half-year's interest on the first set of certificates became payable on the 1st of November, 1823; and that, therefore, these defendants, and Campbell & Co. did, out of the proceeds of such of the second set of certificates as had been sold, appropriate, and set apart the amount of the first half year's interest on such of the certificates as had been issued, and the same was paid by Campbell & Co. to such of the holders

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thereof as applied for the same, and that the second half-yearly dividend did not become payable until the 1st of May, 1824; and that, on or about the 1st of October, 1823, the king of Spain, then possessing and exercising all the functions and powers of the Spanish government, by a royal decree, dated the 1st of October, 1823, annulled, revoked, and made void the said appointment of the said Don Antonio Martinez, and of the said commissioners and all the other acts of the constitutional government; and that, in consequence thereof, the agency and authority of the commissioners, and also the agency of these defendants, and of Campbell & Co., did thereupon cease and determine.

That these defendants, and Campbell & Co. did not appropriate, or agree or undertake to appropriate or apply any part of the moneys arising from the sale of any of the certificates of rentes, to, in or towards the payment of the second half-yearly dividend on any of the certificates; and that, as touching the several matters in the bill mentioned, these defendants were mere agents of the constitutional government of Spain, jointly with Campbell & Co., and under Martinez and the commissioners, for the purpose of issuing and disposing, under the superintendence and control of Martinez, of such certificates as were delivered to them for that purpose. And these defendants do aver that neither the plaintiff, nor any of the holders of bills of exchange, or of certificates, was or were parties or privies to the agreement of the 18th of July, 1823, or to the giving of the said receipt. And that the commissioners and Martinez were not, otherwise than as aforesaid, the lawfully authorized and accredited agents of the government of Spain, and that, save as before-mentioned, Martinez and the commissioners did not deliver, to these defendants and to Campbell & Co., any certificates of rentes, to the intent and purpose that the same might be negotiated or disposed of by these defendants and Campbell & Co., and the produce thereof appropriated by them in payment of the two first half-yearly dividends, which should become due on any certificates of rentes; and that, save as before-mentioned, these defendants and Campbell & Co. did not, by any instrument whatever, or in any other manner, testify or admit that they had received or held the second set of certificates, or any part thereof, upon trust, or for the purpose of negotiating the same, and of applying the produce thereof, or any part thereof, in payment of the two first half-yearly dividends, or any dividends or dividend that should accrue on the first-mentioned set of certificates, or any part thereof, or in any manner engage or contract to pay the whole or any part of the first year's interest on the first set of certificates, or any part thereof, or did, in any manner, become personally liable, to the holders of the last-mentioned certificates, or any of them, for the first year's interest thereon, or any part thereof, or receive or hold the money produced by the sale of the second set of certificates, or of any part thereof, to or for the use of the holders of the first set of certificates, or any of them, or as money specifically appropriated to the payment of the certificates, or any part of the first year's interest thereon, or on any part thereof.

Mr. Knight, Mr. Kindersley and Mr. Follett, for the defendants, Lubbock & Co., in support of the plea:

The bill is filed for a discovery, in aid of an action: it will, therefore, be sufficient to show that the plaintiff cannot maintain any action upon

the facts contained in this bill. But we shall also endeavour to show that the plaintiff has no interest whatever in the matter as to which the discovery is sought.

In Lousada *v.* Templer, 2 Russ. 561; see 564, in which case the bill was filed for a discovery, and for commissions to examine witnesses abroad, in aid of the defence to an action, Lord Eldon thought that the facts, as they appeared on the bill, showed a title to relief in equity, rather than at law; and his lordship, therefore, refused to grant the commissions, inasmuch as a bill of that description, being auxiliary only to relief at law, must show a legal right: but his lordship allowed the plaintiff, under the special circumstances of the case, to convert his bill for discovery into a bill for relief.

In this case, the plea consists of several facts; but they all tend to one point, and tender one single issue, namely, that the plaintiff has no interest in the subject-matter of the discovery. That such want of interest is good matter of plea to a bill for discovery as well as to a bill for relief, is expressly laid down by Lord Redesdale, Treat. Plead. 228, 3d edit. That doctrine was acted upon by Sir John Leach, Vice-Chancellor, in Mendizabel *v.* Machado, 1 Sim. 68. That decision was appealed from, and was reversed, by Lord Lyndhurst, upon the ground, that the facts stated did show that there was a right of action, in which respect only he differed from Sir John Leach.* The principle laid down by Lord Redesdale, and upon which Sir John Leach proceeded, was left untouched by Lord Lyndhurst's decision.

In the argument of Mendizabel *v.* Machado, before Lord Lyndhurst, Hindman *v.* Taylor, 2 Bro. C. C. 7, was much relied upon by the counsel for the plaintiff. The statement of the facts in that case is not very intelligible; and the language attributed to Lord Thurlow, goes to an extent to which it is clear that his lordship never intended to go, as appears by his subsequent decisions in Newman *v.* Wallis, 2 Bro. C. C. 143, and Hall *v.* Noyes, 3. Bro. C. C. 483.

Mr. Pepys, *amicus curiæ:*

In the King of Spain *v.* Hullett, precisely the same plea was put in as in Mendizabel *v.* Machado; and Lord Lyndhurst, in the course of the argument on that plea, had some inquiry made as to Hindman *v.* Taylor; and his lordship's impression was that it was displaced as an authority for the proposition which, according to the report, it appeared to establish.

(The Vice-Chancellor:—Hindman *v.* Taylor is one of the cases in Brown, upon which no reliance can be placed, with regard to the statement.)

In Baillie *v.* Sibbald, 15 Ves. 185, it was contended, in argument, that a plea of what would be a bar to an action, is not a good plea to a bill of discovery in aid of the action, and Hindman *v.* Taylor was cited; but Lord Eldon did not decide upon that ground, but upon the ground that the letters were an acknowledgment of the debt. Lord Eldon, therefore, considered that the question, whether a defence to the action could be pleaded to the bill of discovery, was still undecided. MacGregor *v.* The East India Company, 2 Sim. 452, is an authority that a legal bar may be

* The judgment on appeal is not reported. Mr Knight stated that it was delivered by Lord Lyndhurst in his private room, shortly before his lordship resigned the great seal.

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pleaded to a bill of discovery, provided it has been pleaded to the declaration.

The case stated by this bill is, that the defendants, as the agents for the Spanish commissioners in the business of the loan, received certificates which they were to convert into money, and apply the proceeds in paying interest on the loan. The plaintiff alleges that he is a share-holder of the loan, and that the defendants have received the proceeds of the certificates, in part, for his use; and, therefore, that he has a right to maintain an action, against them, for money had and received, in aid of which he requires the discovery sought by the bill. The facts stated by the plea, amount to this, that, though the defendants did receive the certificates and sell them, and receive the proceeds, they received them as the agents of the commissioners, and not as the agents of the holders of the loan. The defendants were agents for individuals with whom the plaintiff dealt, and acted under their superintendence and control: the plaintiff, therefore, cannot have any demand whatever against the defendants, much less can he have any demand against them which is sustainable in a court of law. Supposing that there was any contract in this case, a contract with A. for the benefit of B. does not give B. a right of action against A.

The case upon this record stands thus: the Spanish government being indebted to certain persons in this country, found it necessary to employ an agent or banker in this country for the purpose of paying those persons; and, to enable their agent or banker to pay the claimants on them, they gave to him certain moneys, or means of raising money. Now in what character did he receive the funds for making the payments? He received them as agent or banker of the Spanish government, with a direction to apply them in a certain way. There is no doubt that, as between him and the Spanish government, he would be bound to apply them in paying the claimants. But, if the Spanish government chose to countermand their authority, and to make a new disposition of the funds in his hands, he would be bound to obey that order. So, if an individual were to direct his banker to pay the annuity for a certain time, yet the individual might revoke his order; but the annuitant would not have a right of action against the banker. Suppose that the banker were to fail, would the loss fall on the annuitant? Besides, it appears in this case, that there was an alteration in the state of the principal. For, in 1823, when the agents first received the funds, the government of Spain was in the hands of the King and Cortes, who had directed the money to be paid to certain persons in this country; and the first dividend was paid under that authority. Between the time of the first dividend being paid, and of the second becoming due, a revolution took place in Spain; and the king countermanded that authority, and directed that the creditors in this country who had received the first dividend, should not be paid the second dividend out of the moneys in the hands of the agents. Taking the bill and plea together, there was no contract in this case, but mandate only.

But, if there was a contract, it was one to which the plaintiff and the other creditors of the Spanish government in this country were not privies; and there is no case where an action for money had and received has lain at law, unless there has been some privity between the plaintiff and defendant. Though there is money sent to an agent to pay, and there is a mandate commanding him to pay, still, if there is no privity between

him and the party who is to receive the money, an action will not lie. In addition to those circumstances, the creditor must show that the agent undertook and pledged himself, to the creditor, to hold the money to his use. Here, there was no such pledge or undertaking, either express or implied; and, therefore, the discovery would be useless; Williams *v.* Everett, 14 East, 582; Scott *v.* Porcher, 3 Mer. 652; Yates *v.* Bell, 3 B. & A. 643; Taylor *v.* Lendey, 9 East, 49; Stewart *v.* Fry, 7 Taunt. 339; Grant *v.* Austen, 3 Price, 58.

The fact of one of the dividends having been paid, does not give the plaintiff a right to have the second dividend paid to him. The defendants were acting as the agents of the Spanish government when they paid the first dividend; but, as to the second, the Spanish government directed them not to pay it, Yates *v.* Bell.

Sir E. Sugden and Mr. Bethell, for the plaintiff:

No such plea as the one now on the record can be supported. The bill is a mere bill of discovery. In Hindman *v.* Taylor, Lord Thurlow, C., says: "The whole remedy being, upon the face of the transactions, at law, the question is, whether you shall, by plea, bring the whole merits on here." The object of the defendants in filing this plea, is to bring, before this court, the question of liability on the contract: so that this court would have to try the right of action upon the imperfect evidence which the plea, and the statements in the bill, which are admitted by the plea, afford, instead of leaving it to be tried in a court of law, to which tribunal it properly belongs. The plea states a variety of circumstances which, it is contended, deprive the plaintiff of his right of action: the answer to it is that the question, whether such is the effect of those circumstances, ought to be tried at law? Gait *v.* Osbaldeston, 5 Madd. 428; Leigh *v.* Leigh, 1 Sim. 349. The plaintiff may have it in his power to produce other evidence in support of his action, and the discovery sought may form a link only in the chain. If the defendants are satisfied that, because the authority of the agents was revoked, the plaintiff cannot maintain his action, why do they withhold, from him, that evidence which may be given as well by an answer as by a plea.

The defendants might have pleaded some general, abstract fact, which would, at once, have put an end to the right of action: but this plea consists of three distinct defences, and is nothing but an informal and imperfect answer, and it concludes with that which is matter of demurrer. It states that the agency of the defendants was revoked; it denies any appropriation, on the part of the defendants, of the proceeds of the second set of certificates, to the payment of the second half-hear's dividend, and it alleges want of privity between the plaintiff and the defendants; but it brings forward no extrinsic fact, to show that there was such want of privity. That, being matter apparent on the face of the bill, is matter of demurrer. It is of the essence of a plea to allege something extrinsic to the bill. Lord Redesdale says that the object of a plea is to reduce the cause to a single point, in order to save the expense of parties and protect a defendant from a defence which he ought not to be compelled to make. Treat. Plead. 295; Whitbread *v.* Brockhurst, 1 Bro. C. C. 404. This plea brings forward a cloud of circumstances, as to which it would be necessary to examine a great number of witnesses, and, therefore, it puts the parties to all the expense and trouble which it ought to be the object of a plea to prevent. After the plea, the defendant goes on to

[Robertson *v.* Lubbock.—4 Sim. 161.]

deny almost every fact alleged in the bill, in the shape of averment, and, thereby, he admits the necessity of putting in an answer in support of his plea.

The annulling of the decree might have relieved the defendants, if they had not incurred an obligation to the different creditors; but, having incurred that obligation, and having, as the plea admits, the money in their hands before their authority was revoked, they are bound to fulfil their engagements.

In Mendizabel *v.* Machado Sir John Leach, V. C. says: "If the King of Spain himself," &c., 1 Sim. 77. Therefore, the ground upon which the court proceeded there was, that the discovery would be against conscience; but that is not the ground upon which we rely.

There is an allegation in the bill which the counsel for the defendants have not adverted to, namely, that the defendants, having received the money for the express purpose of paying the dividends, applied it for their own purposes. That allegation is admitted by the plea, and takes the case out of all the authorities that have been relied upon on the other side. It is obvious that, upon proof of that allegation, the plaintiff would be entitled to recover in *assumpsit*.

The language of the receipt, which is set forth in the plea, confirms the construction put upon the contract, by the plaintiff. For, by that receipt, it appears that the defendants were to hold the surplus only, after payment of the dividends, at the disposal of the Spanish government.

The Vice-Chancellor:—In this case several circumstances are stated, in the bill, as the ground of an action, which the plaintiff has commenced; and the bill is filed for a discovery to support that action. The defendants, by pleading to the bill, admit that the action is maintainable upon the case stated in the bill, otherwise they would have demurred; but they have stated facts, by way of plea, for the purpose of showing that, by reason of those facts, the action is not maintainable. It has been decided that a negative plea may be filed to a bill of discovery; but I apprehend that a plea, in order to be good, whether it be affirmative or negative, must be either an allegation or a denial of some leading fact, or of some matters which, taken collectively, make out some general fact. Now, in this case, the right to discovery is founded upon a variety of circumstances, which are noticed at the end of the plea. First of all it sets forth a set of facts which have the effect of confessing and avoiding the principal matter which is alleged in the bill, namely, a certain authority from the government of Spain. Then it, secondly, avers that there was no agreement to appropriate the moneys in question: and, thirdly, that neither the plaintiff, nor any of the other holders of the bills or certificates, were privy to the agreement of July, 1823. It appears to me, therefore, as it did at the time when the plea was argued, that the plea is not single, but multifarious, and that, for that reason, it must be overruled.

There is a further observation which has occurred to me upon this case. I apprehend that, if a right of action is founded upon a variety of circumstances put together, a plea, which attempts to show that the action cannot be maintained, by confessing and avoiding some of the circumstances, and denying the rest, cannot be good, for this reason, that it, in effect, takes to pieces all the several single grounds which, put together, are asserted as the grounds upon which the action is maintainable; and, by confessing and avoiding some, and traversing others, it reduces the plain-

tiff to the necessity of proving, in a Court of Equity, without a discovery, that he has a right to support that action. But, upon the face of this bill, it is averred, and therefore is admitted by the plea, that the action at law cannot be maintained without a discovery. I think, therefore, that, upon that ground, as well as because the plea is multifarious, it must be overruled.

The Vice-Chancellor, after overruling the plea, was applied to, by the counsel for the defendants, for leave to amend the plea: and his Honour granted the application.

The amended plea was, in substance, as follows: That these defendants, who were merely such agents and for such purposes as specified in the agreement, dated the 18th of July, 1823, never did, nor did any or either of them, in any manner, engage, contract, promise, undertake, or agree with or to the plaintiff, or with or to any person or persons holding or entitled to, or who, at any time or times, held or was or were entitled to the certificates of 380,000 dollars and 24,000 dollars of rentes, in the bill mentioned and therein called the first set of certificates, or any or either of them, or with or to any person or persons on his or their, or any of their account or behalf, that these defendants or any or either of them had received, possessed, held, negotiated, sold or disposed of, or should or would receive, possess, hold, negotiate, sell, dispose of or apply the certificates of 125,000 dollars of rentes in the said bill mentioned, and therein called the second set of certificates, or any or either of them, or the produce or proceeds of such last-mentioned certificates, or any or either of them, or any part of such produce or proceeds, to or for the use or benefit, or on the account of, or in trust for the said plaintiff, or any person or persons holding or entitled to, or who, at any time or times, held, or was or were entitled to, or who might hold or be entitled to, the said first set of certificates, or any or either of them, as moneys, specifically, or otherwise appropriated to pay the whole or any part of the first year's interest thereon, or any or either of them.

The arguments in support of the amended plea, were to the same effect as those in support of the plea as it was originally filed.

The Vice-Chancellor said that the amended plea contained two propositions, one of which asserted that the defendants were such agents and for such purposes as were specified in the agreement of July, 1823; and the other denied that the defendants did, in any manner, engage, contract or promise, &c., so that the plea admitted one of the allegations in the bill, whereas it was the object of the plea to show that the defendants ought not to give any part of the discovery sought; and that, therefore, the plea was wrong in point of form, and must be overruled.

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4 *Simons*, 182.

A sale by an heir apparent, of interests in possession and in reversion, set aside, the consideration being inadequate, and advantage having been taken of the vendor's embarrassments.

January 17, 18, 19; April 15, 1831.

IN 1795, the plaintiff, who was then Viscount Milsintown, was appointed colonel of the North Lincoln militia, and continued to be colonel of the regiment until it was disembodied, in 1816. Upon receiving his commission, he appointed Messrs. M'Donald, Bruce & Landon, army agents, to be the agents for the regiment, and for himself as colonel of the regiment. In 1803, the partnership between M'Donald & Co. was dissolved, upon which the plaintiff appointed Bruce to be agent for himself and the regiment: and Bruce held the appointment till 1816. At the time when the after-mentioned agreement between Bruce and the plaintiff was entered into, the latter was in great pecuniary distress, many of his creditors having commenced actions against him, for debts which he had not any means of satisfying, and he had a large family of children dependent upon him for support. At that time, the plaintiff had no income except his pay and emoluments as colonel of the regiment, and 1499*l.* per annum, which he derived under his marriage settlement, and which consisted of a rent-charge of 500*l.* a year, for the joint lives of himself and his father, the late Earl of Portmore, and interest, at four and a-half per cent, upon a mortgage sum of 5000*l.*, and the dividends of 19,350*l.* 5*s.* 9*d.* four per cents for his own life. But he had charged his income under the settlement with redeemable annuities to the amount of 1050*l.* per annum, and he had also granted another redeemable annuity of 350*l.* for his life: so that his clear income in possession under the settlement amounted to 99*l.* only: but he was also entitled, under the settlement, to a reversionary life-interest, expectant on his father's decease, in 38,483*l.* 9*s.* three per cents. All the above circumstances being well known to Bruce, he, on the 25th of March, 1808, agreed to purchase, of the plaintiff, for 15,500*l.* the interests which the plaintiff was so entitled to under his marriage settlement, and also an annuity of 500*l.*, to commence upon his father's decease, on the happening of which event the before-mentioned rent-charge of the same amount would cease.

On the 25th of March, 1808, the plaintiff was indebted, to Bruce, in 463*l.* 2*s.* 5*d.* on the balance of the regimental accounts subsisting between them. Between the 26th of March, 1808, and the 27th of April in the same year, Bruce advanced to or on the account of the plaintiff, in order to relieve him from the pressing demands of his creditors, several sums of money, most of which were of small amount, but, together with the 463*l.* 2*s.* 5*d.* amounting to 2421*l.* 16*s.* 2*d.*; and, for securing that sum with interest, the plaintiff gave, to Bruce, his bond dated the same 27th of April; and, on the next day, Bruce, as a further security, insured the plaintiff's life for 2400*l.* Between the 28th of April and the 12th of May, Bruce advanced, in like manner, for the plaintiff's use, several other

sums, which, together with the 2421*l.* 16*s.* 2*d.* and the interest thereof, amounted to 4950*l.*; and, for securing that sum, with interest, the plaintiff, on the same 12th of May, gave, to Bruce, a warrant of attorney, upon which judgment was soon afterwards entered up, for 9900*l.* On the 12th of May, 1808, at which time the plaintiff and his father were of the respective ages of thirty-six and sixty-two years, articles of agreement, for the before-mentioned purchase, were entered into, between the plaintiff and Bruce, in which the former was described as the eldest son and heir apparent of the Earl of Portmore; and, thereby, the plaintiff, in consideration of 15,500*l.* to be paid by Bruce, agreed to sell, to him, the interests to which the plaintiff was entitled under his marriage settlement, and to grant, to Bruce, an annuity of 500*l.* for the plaintiff's life, to commence on his father's decease; and it was agreed that the agreement should be completed by the 9th of July then next, and that, in the conveyance to be made, in pursuance of the agreement, there should be inserted a covenant that the plaintiff would not consent to the investment, of the 5000*l.*, or of the 19,350*l.* 5*s.* 9*d.* three per cents, in the purchase of real estates, under the power for that purpose contained in the settlement, or to any alteration of the securities upon which the same were invested, without Bruce's previous consent, and that, in case any such purchase, or variation of securities should be made, then the plaintiff should pay, to Bruce, such sums of money as would give to him an income to the same amount as he was before entitled to, and that the payment of those sums should be secured in the manner therein mentioned: and it was further agreed that all the expenses of the deeds for carrying the agreement into effect, and of filing a memorial of such of them as it should be necessary to memorialize, should be borne by the plaintiff, and that the 4950*l.* (in which the plaintiff was indebted to Bruce, as before-mentioned), should be taken in part of the 15,500*l.* and should, thereupon, be released by Bruce.

Between the date of this agreement and the 9th of November following, Bruce advanced, on Lord Milsintown's account, several other sums of money, principally of small amount, (one of them being 13*s.* only,) and Bruce secured those sums by insuring the plaintiff's life.

The agreement was carried into effect by a deed, dated the 14th of March, 1810, and made between the plaintiff, (who was described as before,) Bruce and the persons who were appointed by him to be his trustees in the purchase, and the several persons to whom the prior annuities had been granted by the plaintiff, and their trustees; and, after reciting the agreement of the 25th of March, 1808, and that, on the same day, the plaintiff was indebted to Bruce, on the balance of his pay-account, in 463*l.* 2*s.* 5*d.* and that Bruce had at different times during the months of March and April, 1808, paid, to or on account of the plaintiff, the several sums of money therein specified, amounting, with the 463*l.* 2*s.* 5*d.* to 2421*l.* 16*s.* 2*d.*, for securing which sum the plaintiff had executed the bond of the 27th of April, 1808, and Bruce had insured the plaintiff's life for 2400*l.*, and further reciting that, in the months of April and May, 1808, Bruce had paid, to or on the account of the plaintiff, several other sums of money, therein also specified, and which, with the 2421*l.* 16*s.* 2*d.*, amounted to 4950*l.* for which the plaintiff had given the warrant of attorney, as before-mentioned, upon which judgment had been entered up; and that, between the 12th of May and the 9th of November, 1808, Bruce had paid other sums, in like manner, for secur-

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ing which he had insured the plaintiff's life, for 600*l.*, and that, for better securing his said debt, he had effected three other insurances on the plaintiff's life, at the premiums therein mentioned, and that it had been agreed that the purchase should take effect from the date of the now stating indenture, instead of the 9th of July: and that there was then due, to Bruce, 95*l.* for interest on the 2421*l.* 16*s.* 2*d.* up to the 12th of May, 1808, and 407*l.* 15*s.* for interest on the 4950*l.* from the 12th of May, 1808, and 91*l.* 18*s.* for interest on the sums paid, by Bruce, to or on the account of the plaintiff, since the same 12th of May, and that it had been agreed that the plaintiff should pay or allow the premiums and duties paid by Bruce on the policies of insurance, which, with the interest thereon, amounted to 89*l.* 18*s.* and that that sum, and the sums paid, by Bruce, on the plaintiff's account, since the 12th of May, 1808, the 4950*l.*, and the sums so due for interest, amounted together to 6864*l.* 3*s.* 10*d.*; and that Bruce had received, on the plaintiff's account, 236*l.* 6*s.* for regimental accoutrements, which, with interest, amounted to 251*l.* 13*s.* 8*d.*, and that sum being deducted from the 6864*l.* 3*s.* 10*d.* left a balance of 6612*l.* 10*s.* 2*d.* due to Bruce: and that it had been agreed that the annuities which the plaintiff had granted, should be repurchased, and the arrears thereof discharged, out of the purchase-money of 15,500*l.*, and that Bruce had accordingly paid, to the annuitants, 11,850*l.* 9*s.* 10*d.* in the whole, and which being added to the 6612*l.* 10*s.* 2*d.*, amounted to 18,463*l.*, and that it had been agreed, that that sum, so consisting of principal and interest, should be deemed one aggregate principal sum, and that 15,500*l.*, part thereof, should be accepted, by the plaintiff, in satisfaction of the 15,500*l.* agreed to be paid by Bruce for the purchase, and that 2963*l.*, the remainder of the 18,433*l.* should be considered as so much principal money owing to Bruce, from the plaintiff; and further reciting that it had been agreed that the duty *ad valorem* on the purchase, should be borne by them equally, and that the plaintiff should pay all the other expenses of carrying the purchase into effect, and that Bruce had agreed to lend the plaintiff 460*l.* (which was to be added to the 2963*l.*) to enable the plaintiff to pay his share of the *ad valorem* duty, and the bill of costs of Bruce's solicitor in the purchase. It was witnessed that Bruce released the plaintiff from the 15,500*l.*; and, the plaintiff assigned, to Bruce, the rent-charge of 500*l.*, created by his marriage settlement, the interest and dividends of the 5000*l.*, and of the 19,350*l.* 5*s.* 9*d.* four per cents, payable to the plaintiff for his life, and also the dividends of the 38,483*l.* 9*s.* consols, which would be payable, to the plaintiff, for his life, after the decease of his father: and the plaintiff covenanted, with Bruce, that he would not consent to the investment of the 5000*l.* or of the produce of the 19,350*l.* 5*s.* 9*d.* four per cents, in the purchase of real estates, or to any alteration in the state of investment of those sums, without Bruce's previous consent in writing, and that, if any such purchase or alteration of investment should be made, the plaintiff would pay, to Bruce, such sum or sums of money as would give him an income equal to the income to which he was entitled prior to such purchase or alteration of investment: and the plaintiff covenanted not to exercise the power given to him, by his marriage settlement, of charging the hereditaments therein comprised, with portions for the children he might have by any future marriage: and the plaintiff granted, to Bruce, an annuity of 500*l.* for the plaintiff's life, to commence after his father's decease, and to be charged upon the heredit-

aments which were subject to the existing rent-charge of 500*l.* and also upon the reversion of those hereditaments: and a term of 200 years, to commence after the decease of the plaintiff's father, was granted, out of the said hereditaments, to James Gordon, as a trustee for Bruce, for securing the annuity: and, in consideration of the sums which Bruce had paid to the parties to whom the prior annuities were granted, they and their trustees assigned their annuities, and the securities and terms for years by which they were secured, to Gordon, Anderson and Hyatt, in trust, for further securing the annuity of 500*l.* thereby granted to Bruce: and it was declared that the terms for years thereby granted and assigned, and the contingent reversionary interest which the plaintiff had in the 19,350*l.* 5*s.* 9*d.* four per cents, and in the 5000*l.*,* should be a security, to Bruce, against any judgments not thereby assigned, which should appear to have been obtained against the plaintiff, and also against any such diminution of income as aforesaid; and that, in case any money should be paid by reason of any such judgments, or any money to become due and owing to Bruce, by reason of such diminution of income, should remain unpaid for one month after demand, then it should be lawful for Bruce, as often as occasion should require, to insure the life of the plaintiff, to the amount of the sums so paid and remaining due, and that the same sums and the sums to be paid for insurance, with interest for the same at the rate of five per cent, should be a charge upon the rents of the hereditaments comprised in the terms of years thereby granted and assigned, and be raiseable under the trusts thereof, and that it should be lawful for Bruce to distrain for the same: and that the policies of insurance should be held, by Bruce, upon trust for securing to him the sums of money, and interest thereon, which, from time to time, should remain due and owing to him upon the account last mentioned, and, subject thereto, in trust for the plaintiff.

In December, 1817, a commission of bankrupt was issued against Bruce, and the defendant Taylor was chosen his assignee. The rent-charge of 500*l.*, and the interest and dividends of the 5000*l.* and 19,350*l.* 5*s.* 9*d.* four per cents, were received by Bruce and his assignee, down to the quarter-day preceding the death of the plaintiff's father.

On the 15th of November, 1823, the late Lord Portmore died: at that time the plaintiff was abroad, and it appeared that he was out of the kingdom in April, 1825. On the 1st of September in that year, the bill was filed against Taylor, Gordon, Anderson and Hyatt, stating that the interests conveyed to Bruce by the indenture of March, 1810, were of much greater value than 15,500*l.*, regard being had to the then age of the plaintiff's father: that, by the conveyance, Bruce acquired an immediate income of 1499*l.*, and an income of 1154*l.* 10*s.*, expectant upon the life-

* The plaintiff was entitled, under his marriage settlement, not only to the life-interests before-mentioned, in those two sums, but also to the capital of them, in case there should not be any child of the marriage who should attain twenty-one. Before the agreement was entered into, the lady, upon whose marriage with the plaintiff the settlement was executed, had died, and there was only one child of the marriage, who was still an infant. Some of the repurchased annuities had been secured upon the plaintiff's interest in the capital as well as in the dividends of those sums, and, in a preceding part of the deed, those sums were assigned to Bruce, in trust, as to the plaintiff's life-interests therein, for Bruce, and, as to the capital, in trust for the plaintiff, so far as he had such contingent interest therein.

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interest of the plaintiff's father: that, on the death of the plaintiff's father, the income payable to Bruce amounted to 2653*l.* 10*s.* per annum: that the sum of 6612*l.* 10*s.* 2*d.* consisted of a great many different sums, some of which were paid, by Bruce, to or on account of the plaintiff, to satisfy creditors who were suing, or threatening to sue the plaintiff, for their debts, as was well known to Bruce at the time, and that others of such sums had been paid by Bruce, before the agreement of May, 1808, was entered into, or had been claimed and retained by him on account of the premiums on the policies of insurance: that Bruce, from the year 1803 down to the date of the deed of March, 1810, and afterwards, acted not only as the plaintiff's regimental agent, but also as his general pecuniary agent, and was acquainted with all his affairs, and received and paid moneys on his behalf: that, by the agreement, it was stipulated that the 4950*l.* for which the plaintiff had given the warrant of attorney, of the 12th of May, 1808, should be taken in part payment of the 15,500*l.*, and that the plaintiff should be released from the 4950*l.*, and from the securities for the same: but that the plaintiff's bond, of the 27th of April, for part of that sum, had not been delivered up, and that the judgment which had been entered upon the warrant of attorney of the 12th of May, 1808, was still in force.

The bill charged that, in the transactions aforesaid, Bruce took undue advantage of the plaintiff's pecuniary distress, being, at the time, the pecuniary agent of the plaintiff: and that, at the dates of the agreement and of the indenture, Bruce held the plaintiff's bond and warrant of attorney, and took advantage of his power over the plaintiff, and induced the plaintiff to consent that the annuities which had been redeemed, should be converted into irredeemable annuities.

The bill prayed that the agreement and the indenture of March, 1810, might be delivered up to be cancelled, upon payment of what, if any thing, then remained due, from the plaintiff, in respect of the 15,500*l.*, and interest thereon; and that accounts might be taken, upon the one hand, of the 15,500*l.* and interest, and, on the other hand, of the sums received, by Bruce and his assignee, in respect of the rent-charge of 500*l.*, the interest of the 5000*l.*, the dividends of the 19,350*l.* 5*s.* 9*d.* four per cents, and of the 38,483*l.* 9*s.* three per cents, or otherwise in respect of the annuities conveyed by the indenture.

The defendant Taylor, by his answer said, and his witnesses proved, that the accounts, between Bruce and the plaintiff, were, from time to time, examined and approved by the plaintiff with the assistance of his solicitor, and that the agreement and the deed of March, 1810, were perused and approved by the latter, on the plaintiff's behalf: and he contended that the transactions mentioned in the bill, were fair and valid, and that no advantage had been taken of the plaintiff.

Mr. Morgan, the actuary of the Equitable Assurance Office, who was examined for the plaintiff, deposed that, according to a fair computation, and assuming that Lord Milsintown was in the thirty-sixth year of his age, in May, 1808, an annuity of 500*l.* payable during his life, was then worth 6188*l.* or thereabouts, that the interest, at 4*l.* 10*s.* per cent on a mortgage for 5000*l.*, payable for the same period, was, at the same time, worth 2784*l.* or thereabouts, and the interest and dividends of the 19,350*l.* 5*s.* 9*d.* four per cents payable for the same period, was, at the same time, worth 9579*l.* or thereabouts, and the interests and dividends of the 38,483*l.* 9*s.* three per cents, payable during the life of Lord Milsintown,

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after the decease of his father, was worth, at the same period, 6353*l.* or thereabouts, assuming that Lord Milsintown was in his thirty-sixth year, and his father in the sixty-second year of his age: and that, according to a fair computation, the aforesaid interests were respectively worth in March, 1810, as follows: that is to say, the annuity of 500*l.*, 6060*l.*: the interest and dividends of the 19,350*l.* 5*s.* 9*d.* four per cents, 9385*l.*: the interest, at four and a half per cent, on the 5000*l.* mortgage, 2727*l.*: and the interest and dividends on the 38,483*l.* 9*s.* consols, 6526*l.* And he said that he had ascertained those values according to the ordinary calculation and estimate of the value and of the duration of life, and that he was unable to say what the said interests would have produced, upon a sale thereof, in May, 1808, or in March, 1810, as that would depend upon other circumstances, beyond the computation of an actuary; and one of the defendant's witnesses deposed that, in 1813, the plaintiff's solicitor had, in his presence, offered Bruce 25,000*l.* for the property purchased by Bruce of the plaintiff, and that Bruce replied that he did not intend to dispose of it. The defendant Hyatt (who was examined as a witness for Taylor) deposed that, in his judgment, the property was not of greater value than 15,500*l.*, because, if the plaintiff could have obtained a larger sum, he would not have sold it to Bruce at that price: but he did not profess to be a competent judge of property of that nature.

Sir E. Sugden, Mr. Pepys and Mr. James, for the plaintiff:

In cases like the present, it is always material to see whether the party selling is a free agent. The plaintiff could not be called so: he was a needy nobleman, much embarrassed in his circumstances, and was dealing with a man who had a great command of money. He had granted annuities (all of which were redeemable), amounting, within 99*l.* per annum, to his income in possession. The transaction, which was carried into effect by the deed of March 1810, was not a purchase, out and out, of a life-interest; but was an annuity transaction. By the transaction which the bill now seeks to set aside, Bruce, for 15,500*l.*, acquired an immediate income of 1499*l.*, and an income expectant upon the decease of the plaintiff's father, who was of an advanced age, of 1154*l.* All the terms of the agreement point to the grant of an annuity, and not to a purchase. The expenses of the deeds, (as is always the case in grants of annuities, but not in purchases,) were to be borne by Lord Milsintown, and, in case the 5000*l.* or the produce of the 38,483*l.* three per cents, or of the 19,350*l.* four per cents, should be laid out in the purchase of lands, Lord Milsintown was to pay, to Bruce, such a sum as would give him an income to the same amount as he was entitled to before the purchase. Browne *v.* Like, 14 Ves. 302. At the time when the agreement was entered into, the plaintiff's income was 99*l.* only, and Bruce held a warrant of attorney from him, on which judgment was afterwards entered up for securing 4950*l.* and interest; and, therefore, at that time, his property and person were placed in the power of Bruce, for he had no means of discharging the debt. The plaintiff was in the lowest state of destitution, and was continually subject to arrest. It appears, by the recitals in the deeds, that the moneys which from time to time were advanced by Bruce, were doled out, in small sums, amounting, for the most part, to 10*l.*, 20*l.* and 50*l.* only, as to a person in the most abject poverty and distress. Bruce, by paying these small sums, had clear knowledge of Lord Milsintown's

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distresses. It also appears that Lord Milsintown was to pay half the *ad valorem* duty on the purchase, and the bill of costs of the solicitor employed, by Bruce, in the purchase: and, to enable him to make these payments, he was under the necessity of borrowing 460*l.* of the person who ought to have paid them himself. By the deed, Lord Milsintown assigned, to Bruce, the rent-charge of 500*l.*, the interest and dividends of the 5000*l.* and of the 19,350*l.* four per cents, and of the 38,483*l.* three per cents, after the decease of the Earl of Portmore, and entered into covenants not to exercise the power of raising portions for his children; and also to indemnify Bruce against the diminution of income which might arise from any alteration that might take place in the investment of the 5000*l.*, and of the two sums of stock. And he further granted, to Bruce, a reversionary annuity of 500*l.*, to commence upon Lord Portmore's decease. The deed contains provisions which every man would have resisted, if it had been in his power. But whatever Bruce asked, Lord Milsintown was forced to grant. Mr. Morgan, in his evidence, states that the value of the interests purchased, was 24,904*l.* in 1808, and 24,698*l.* in 1810, so that, at both those periods, the price paid was upwards of 9000*l.* short of the actual value of the property sold. It is also proved that Bruce rejected the offer of 25,000*l.* for the re-purchase.

It is important, too, to observe that, at the time of these transactions, the plaintiff was in the situation of an heir apparent to an earldom, and was stripping himself of reversionary interests which would fall into possession on his father's death, which would invest him with the earldom. It is one of the fundamental principles of this court, to protect expectant heirs, who are dealing with their expectancies. Peacock *v.* Evans, 16 Ves. 512; Davis *v.* Duke of Marlborough, 2 Swanst. 108; Gwynne *v.* Heaton, 1 Bro. C. C. 1.

The purchase was one entire transaction, and must be wholly rescinded. It cannot stand as to the property in possession, and fall as to the property in reversion. The operation of the transaction was that Bruce purchased all the annuities, and bought, from the plaintiff, nothing in possession, except 99*l.* a year: and he deprived the plaintiff of the right of redeeming the annuities, which, before, might have been redeemed at any time. Bruce, too, threw upon the plaintiff the expenses of the deeds, and half the *ad valorem* duty, by which means the whole of the purchase-money was swallowed up. This is a further proof of the power which he had over the plaintiff.

Bruce, as appears from the recitals in the deed, in which the accounts between him and the plaintiff are mentioned, was not only the plaintiff's regimental agent, but also his pecuniary agent. And the case upon this record amounts, simply, to a dealing between an agent and his principal, the effect of which was to strip the latter of all his property for a sum less than the value, by 9000*l.*

The case of Gowland *v.* De Faria, 17 Ves. 20, went to this extent, that, if the purchaser of a revisionary interest has not given the full value for it, according to the tables, the transaction must be set aside. But it is not necessary, in this case, to contend for the rule to that extent; as the consideration here is so greatly disproportionate to the real value; and, therefore, without adverting to the relative situations in which the parties stood to each other, or to the circumstance that Lord Milsintown was an heir apparent, this purchase must be set aside, on the ground of

the inadequacy of the consideration alone. Fox *v.* Mackreth, 2 Bro. C. C. 400; Heathcote *v.* Paignon, 2 Bro. C. C. 167; Gartside *v.* Isherwood, 1 Bro. C. C. 558.

Mr. Knight and Mr. Roupell, for the defendant, Taylor:

Bruce was agent for the plaintiff merely as colonel of the regiment. Is there anything arising out of the relative situations of an army agent and the colonel of the regiment, for which he is agent, to preclude them from contracting with each other? It has been said that the prior annuities were redeemable, but there is no evidence of that fact. It has been contended that Lord Milsintown was under the dominion of Bruce, and was not a free agent in the transaction which is sought to be impeached. He was, however, of the mature age of thirty-six; and, in every step of the transaction, he acted under the advice of his solicitor, Mr. Surman. The agreement was entered into in 1808, and, after the lapse of two years, the deed was prepared and approved of by Lord Milsintown's counsel and his solicitor, and was afterwards deliberately executed by him. It contains recitals of the accounts, with the most minute and elaborate detail. The whole of them had been gone through with Surman, and had been approved and signed by him. If the transaction is to be set aside, Surman would have been the best witness in support of the plaintiff's case; but he has not been examined. The fact that Bruce took a bond and warrant of attorney from the plaintiff, has been much relied upon. What unfairness was there in his taking securities for his advances, whilst the purchase remained *in fieri?* With respect to Lord Milsintown's agreeing to pay the expense of the deeds, in annuity transactions, nothing is more common than for the grantor to pay those expenses. In ordinary cases of sales of estates, such agreements have been made, though they are unusual. In this case a reversionary annuity was granted; so that, in fact, it was an annuity transaction, to a certain extent. There is no objection in law, to the grant of an annuity, without a clause of repurchase. The plaintiff's case gains nothing by showing that it was an annuity transaction.

Then the deed was objected to, because it contains a covenant that Lord Milsintown would not execute a power, which he had, to charge the estates with portions: but there is nothing in that covenant that carried the obligations of Lord Milsintown further than they stood before. After he had sold his life-interest, he could not do any thing in derogation of it.

Now, if the transaction is such as cannot be impeached on its own merits, let us consider whether the rule, as to the sales of reversionary interests, applies. The extent to which the court has gone, in setting aside sales of reversions, has been often regretted. An actuary's estimate of the value of a reversion, is not, of necessity, the only criterion of value. Shelly *v.* Nash, 3 Madd. 232. In that case the sale by auction was held to be the criterion of value. It is consistent with Morgan's evidence that, if the property had been put up to auction, it would have produced a less sum. He has formed his estimate on the supposition that four per cent would be the dividend payable, during the whole of Lord Milsintown's life, upon the 19,350*l.* stock, which we know not to be fact; for that dividend has since been reduced to three and a half per cent; and he has also taken it for granted that the interest of the 5000*l.* would not be reduced. Is a calculation, founded upon such grounds, to be depended

on? Hyatt's evidence shows that the price paid was the full value of the property sold. The plaintiff has not proved what was the value of the property in the market, which is the only fair criterion of value. Whichcote *v.* Bramston, *post*, 101. In that case a reversionary interest, contingent on a married woman dying without issue, was sold for a sum less than it had been valued at by an actuary, and, notwithstanding, it was referred to the Master to inquire whether it had been sold at a fair and adequate price. The Master, at first, reported that the price was not a fair and adequate one. It was then referred back to him to review his report, and he ultimately certified that, having regard to certain facts, the price was fair and adequate; and Lord Lyndhurst, on appeal, confirmed the sale, and expressed it to be his opinion, that the question as to the value of a reversionary interest, was not to be decided by an actuary's valuation. The case of Headen *v.* Rosher, 1 Macleland & Younge, 89; Hincksman *v.* Smith, 3 Russ. 433, is precisely in point. The decision in that case was cited and approved of, by Lord Lyndhurst, in Whichcote *v.* Bramston, and it has never been called in question. The rule laid down in Garland *v.* De Faria, cannot be supported to its full extent, and is not warranted by previous decisions.

This case is peculiar in its nature. It is a sale of interests, some of which were in possession and others in reversion. By what medium is the court to ascertain what part of the price was paid for the one, and what part for the other. The court has never set aside sales where part of the property sold was in possession, and part in reversion, for the price cannot be apportioned. In Davis *v.* The Duke of Marlborough, 2 Swanst. 154, Lord Eldon alludes to many points of doctrine, and, amongst others, to a sale of a reversion coupled with a merely nominal interest in possession, and he alludes to it as a case presenting considerable difficulty. In this case the plaintiff had a fair and substantial interest in possession. It was not only not a mere colourable interest, but a most valuable one; for the buying up of the annuities let Bruce into the immediate receipt of an income of 1499*l.* a year. The reversionary interest was the least valuable. If Bruce was able to purchase the annuities for less than their full value, why is he not to have the benefit of that purchase in calculating the value?

Next, as to the delay which has taken place in filing the bill. A party who seeks to impeach a transaction, ought to institute proceedings at the earliest period. Supposing that period to be, in this case, the death of Lord Portmore, twenty-two months were suffered to elapse after that event, before the bill was filed. However, no change took place in Lord Milsintown's circumstances by Lord Portmore's death, except that the interest in reversion then became an interest in possession; and, for any thing that appears to the contrary, Lord Milsintown was able to extricate himself from all his difficulties, in his father's lifetime. If that be so, it was the duty of Lord Milsintown to prove that the pressure upon him continued, and that the death of Lord Portmore created a material difference in his circumstances. There is, however, no evidence to that effect, and the delay is in no manner accounted for. There is no case of this description in which this court has given relief after acquiescence for such a length of time.

Mr. Hinds, Mr. Combe and Mr. Flather, appeared for the other defendants.

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Sir Edward Sugden, in reply:

It has been said that Mr. Morgan, in his estimate, did not take into his calculation that the four per cents were liable to be reduced: but the court has to consider what was the value of the plaintiff's interest at the time of the sale, and not what are their values at the present time. Besides, if the dividends had been increased, or the stock had risen above par, Bruce would have reaped the benefit. If the rate of interest has fallen, the 15,500*l.* is of less value than it was at the time of the sale; for, by reducing the rate of interest, the value of the capital is reduced.

Delay in commencing the suit has been imputed to the plaintiff: but the proof of his being abroad until April, 1825, relieves him from that imputation. The circumstances of Lord Portmore being thirty-six years of age when he entered into the agreement, and of his having had the advice and assistance of his attorney, have also been relied upon; but the court has relieved in cases where the age of the party has been greater; and the fact that an attorney was employed, has never been considered as of any weight.

Next, as to the authorities that have been cited for the defendant. In Shelly *v.* Nash the decision was founded on the sale having been by auction, which was evidence of the market price, and on there having been no previous dealing between the parties, or knowledge of each other. In Headen *v.* Rosher there was nothing to show, on the result of the evidence, that the price was inadequate; and moreover, there had been a confirmation of the sale, and there was the contingency of issue. Whichcote *v.* Bramston was very peculiar and complicated in its circumstances. There, a lady, having a large reversionary property, agreed to sell a portion of it, amounting to 6000*l.*, for an annuity of 500*l.* It was uncertain at which of two periods the annuity was to commence; if at the earlier period, the consideration was adequate; if at the later period, the consideration was inadequate. The Master, upon the evidence of Mr. Morgan, whose opinion was given on the supposition that the annuity was to commence at the later period, reported that the price was inadequate. It was afterwards proved that the annuity was to commence at the earlier period, and the question as to the adequacy of the price was referred back to the Master, and Mr Morgan's opinion was again taken: it then appeared, by his calculation, that the price was adequate, and the Master reported accordingly. That case, therefore, is a decision in the plaintiff's favour, as it shows that the opinion of an actuary is conclusive as to the value of reversionary interests.*

* The facts of the case referred to were, that Mrs. Piggott, being entitled to 10,000*l.*, to be paid upon the deaths and failure of issue of Michael Newton and two ladies, who, in February, 1802, were respectively of the ages of 69, 70 and 76 years, sold 6000*l.*, part of the 10,000*l.*, to Mr. Newton, to whom the plaintiffs were executors, in consideration of an annuity of 500*l.*, granted by him to Mrs. Piggott. The bill was filed against the executors of Mrs. Piggott and the trustees of the estates charged with the 10,000*l.* to have the 6000*l.* raised and paid to the plaintiffs. Mrs. Piggott's executors contended, by their answers, that the annuity was an inadequate consideration for the 6000*l.*: and it was referred to the Master to inquire as to that fact. The plaintiffs contended, before the Master, that the annuity commenced on the 2d of February, 1802, but the defendants contended that it did not commence until the 2d of February, 1804; the Master rejected the evidence tendered for the plaintiffs upon that subject, and calculated the value of the annuity (as commencing from the latter period)

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The Vice-Chancellor:—The facts of this case, as they appear on the pleadings and evidence, are these: In the year 1808 the present Lord Portmore, then Lord Milsintown, was entitled, under the settlement made on his marriage, in the year 1793, to an annuity of 500*l.* during the joint lives of himself and his father, Lord Portmore: and he was also entitled, during his own life, to interest at four and a-half per cent on the sum of 5000*l.*, and to the dividends of 19,350*l.* 5*s.* 9*d.* four per cents: and he was also entitled, for his own life, in the event of his surviving his father, to the dividends of 38,483*l.* 9*s.* three per cent consols: that is, in other words, to an income in possession of 1499*l.* a year, and to an income, in reversion, of 1154*l.*: but this income was incumbered with annuities, which he had granted for his own life, to the amount of 1400*l.*, so that he had, in the year 1808, the present, unincumbered income of 99*l.* a year only, and an income in reversion, of 1154*l.*, charged with the annuities in the way I have mentioned. Prior to the year 1808, the plaintiff being the colonel of the North Lincoln militia, appointed Mr. Bruce and the persons who were then in partnership with him, to be agents for the regiment: and, upon that partnership being dissolved, the plaintiff appointed Mr. Bruce to be the agent for the regiment and for himself, in his capacity of colonel of that regiment. In the month of March, 1808, the plaintiff was labouring under very great pecuniary embarrassments, and he had then a family of six or seven children: and he had no means of supporting himself and them, except what were derived from the income which I have stated, and also from his pay and profits as colonel of the North Lincoln militia.

at 2767*l.*, and he found that the reversionary interest in the 6000*l.* was no subject of computation, by reason of the contingency of issue, but that, without regard to such contingency, the same was, on the 2d of February, 1804, worth 3400*l.*: and he was, therefore, of opinion that the annuity was not an adequate consideration for the reversionary interest in the 6000*l.* The plaintiffs having excepted to the report, it was referred back to the Master to review his report, and the Master found that the annuity did, in fact, commence in payment and was paid from the 2d of February, 1802; that, according to the valuation of Mr. Morgan, the value of the annuity, as commencing from that day, was 3034*l.*, and according to the valuation of a Mr. Harrison, 3075*l.*; and that the value of the reversionary interest in the 6000*l.* could not be accurately ascertained by reason of the contingency of issue, but that, without regard to that contingency, the same was, on the 2d of February, 1802, according to Morgan's valuation, worth 3194*l.* 11*s.* 6*d.* and according to Harrison's valuation, 3200*l.*: but that Harrison stated that the chance of a man of Mr. Newton's age having issue, was not so remote as to make it a matter unworthy of consideration, and, if the reversionary interest were put up to sale, would greatly depreciate its value; but to what degree it was impossible to determine, as the contingency was not a subject of calculation: the Master found that, on the 2d of February, 1802, the value of the annuity was 3054*l.* 10*s.*, and the value of the reversion, without having regard to the contingency of issue, was 3197*l.* 5*s.* 9*d.*: but that, though that contingency was incapable of accurate valuation, it was not wholly without value, and he was of opinion that, having regard to the contingency, the annuity was an adequate consideration for the reversionary interest in the 6000*l.* The defendants excepted to this report, and, upon the cause coming on to be heard upon the exceptions, and for further directions, the exceptions taken by the plaintiffs to the former report were allowed, and the exceptions taken by the defendants to the latter report were overruled, and the fund in court, after payment of the costs of the trustees, was ordered to be paid to the plaintiffs. The defendants appealed from this order: and the appeal was dismissed.

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In March, 1808, an agreement was made, (which I understand to be a verbal agreement,) that the plaintiff should sell, to Mr. Bruce, the whole of his income, both in possession and in remainder, under his marriage settlement, for a sum of 15,500*l.*: but one of the terms of the agreement, was that the annuity which the plaintiff had during the joint lives of himself and his father, should be made an annuity for his own life, in the event of his surviving his father. This agreement having been made on the 25th of March, 1808, between that day and the 27th of April following, several sums, many of which were very small, were paid, by Mr. Bruce, on the account of Lord Milsintown. Those sums amounted together to 2421*l.* 16*s.* 2*d.*, and a bond was given, by the plaintiff, for the payment of that sum, with interest. Between the 27th of April, and the 12th of the following May, several other sums of money, which were also small, were paid, by Mr. Bruce, on account of Lord Milsintown, making, together with the preceding sums, 4950*l.*: and, on the 12th of May, 1808, a warrant of attorney was given for the payment of the whole, with interest; and judgment was entered up for the sum of 9900*l.* On the same 12th of May, 1808, articles of agreement, in writing, were executed, for making the sale which I have before mentioned. Part of the agreement was that Lord Milsintown should bear all the expenses of the necessary deeds for giving effect to the transaction, and also the expenses of filing a memorial, in case it was thought necessary. And it was agreed that the 4950*l.* should be taken as part of the purchase-money. After the articles of agreement were signed, Bruce advanced further sums, many of which were very small, on Lord Milsintown's account, and he effected policies of insurance on Lord Milsintown's life, for securing those sums, the policies being for short periods and the premiums small, and interest was allowed by Lord Milsintown on the premiums paid, by Bruce, on effecting the policies. The whole sums that were so paid, and for which Lord Milsintown became indebted in the way I have mentioned, after giving credit for a small sum received on his account in respect of regimental accoutrements, amounted to 6612*l.* 10*s.* 2*d.*

A deed was then executed, bearing date the 14th of March, 1810, which was made between a vast number of persons, in whom were vested the annuities previously granted, and Lord Milsintown and Mr. Bruce, and persons who were trustees for the latter. It appears that a sum of 11,850*l.* 9*s.* 10*d.* had been paid, by Mr. Bruce, to the holders of the annuities, for the re-purchase of them.

In the course of the argument of the case at the bar, there was a doubt thrown on the fact, whether the annuities were redeemable or not; but it appears, most distinctly, that the annuities were redeemable, both from the statement in the answer, and from the nature of the very transaction itself as it stands confirmed by the deed in question.

Then, by this deed, there was an assignment made of all the interests which Lord Milsintown was entitled to, as I have before detailed, and there was a grant made, by Lord Milsintown to Bruce, of an annuity of 500*l.*, to be payable during the continuance of his own life, in the event of his surviving his father: and the persons interested in the annuities assigned their annuities to trustees, in trust for securing the due payment of the annuity so granted to Mr. Bruce.

Payments were made in pursuance of that deed, and the transaction remained unimpeached until after the death of the father of the present Lord Portmore, who died in the month of November, 1823. At that

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time the present Lord Portmore was abroad, and it does not appear that there was any payment made after the death of his father; some negotiation however took place between Lord Milsintown's solicitor and Mr. Bruce.

In September, 1825, the bill was filed for the purpose of rescinding the transaction. And the question that arises on the facts I have stated, is whether this court ought to allow the transaction to stand. In the course of the argument a reference was made to the position which is to be found in the case of Gowland *v.* De Faria. But I do not think that, for the purpose of deciding the case before me, it is necessary to determine how far the proposition attributed to Sir William Grant is or not borne out by the cases; but, on looking at a great number of cases which are to be found on this subject, it seems to be placed beyond all doubt that, where a person who stands in the situation of an heir apparent, is in distress, and deals with a party who is aware of the distress, and sells his reversionary interest for a price which is manifestly not its worth, this court will set aside the sale.

But, in the case now before me, the transaction was not merely for the purpose of purchasing the reversionary interest; but part of the subject of sale was the interest in possession; and it is with reference to the magnitude of the interest in possession, as contrasted with the magnitude of the interest in reversion, that the question arises.

The whole price which was to be paid was 15,500*l.*; and the sums which were paid for the re-purchase of the annuities, amounted to 11,850*l.* 9*s.* 10*d.* and that would therefore leave a balance of about 3650*l.* and a fraction. Mr. Morgan, in his evidence, states that, in 1808, at which time the present Lord Portmore was of the age of 36, and his father 62, (so that in 1810 he would be 38, and his father 64,) the aggregate value of all the interests which were to be sold, amounted to 24,904*l.*, and the aggregate value of the same in 1810, at the time when the deed was executed, amounted to 24,698*l.*, whereof the sum of 6526*l.* is to be attributed to the value of the reversionary interest. It appears, by Mr. Morgan's calculation, that the value which he put upon the annuity during the present Lord Portmore's life in 1810, was something more than twelve years' purchase, because he states that 6060*l.* was the price of the annuity of 500*l.* during his life. Now Lord Portmore was in such a situation as that it was utterly impossible for him to redeem the annuities, and the sum of 11,850*l.* 9*s.* 10*d.* was properly attributed to redeem them. About that there is no question. But then, if I consider that the thing substantially sold was the present income of 99*l.* a year during the present Lord Portmore's life, and the reversionary interest of 1154*l.*, and, if I attribute, according to the rate of calculation which Mr. Morgan has adopted, about 1200*l.* as the price of the interest in possession of 99*l.* a year, then the aggregate value of the interest in possession and the interest in reversion, will be 7726*l.* The sum which remained of the 15,500*l.* after deducting that which was to be applied to the redemption of the annuities, was only 3650*l.*, which is not half the sum that would be necessary to make up the value, according to Mr. Morgan's calculation, of the interests in possession and of the interests in reversion.

It was proved that Mr. Surman was the solicitor of Lord Portmore; and he appears to have been fully consulted as to the form of the deed; but it has not been attempted to prove that any person whatever was

consulted as to the quantum of consideration to be given for the interests which were purchased.

The case, therefore, falls within the proposition which Lord Eldon has laid down in the case of Davis *v.* The Duke of Marlborough, where, after having used the following language, namely: "I must still admit it to be clearly established that, if a person has dealt, with an heir apparent, for interests of which he is not in present possession, this court extends to the heir the benefit of this principle, with reference to those so dealing with him, that it does not rest on him to show that it was reasonable." 2 Swanst. 139. His lordship says, in a subsequent part of his judgment: "I should certainly hesitate long before I lay down, as a principle, that, if an heir apparent dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, he is not entitled to the protection given to heirs apparent dealing for their expectations. 2 Swanst. 154.

In this case I have shown that the value of the annuity bears but a very small proportion to the estimated value of the reversion, the latter being about one-sixth of the former: and it would be perfectly clear, beyond a doubt, circumstanced as Lord Portmore was, that, if the contract had been for a sale of the reversion only at the price which appears to have been given for it, the court would not have allowed the transaction to stand; and I think that the mere fact that the interest in possession, amounting to 99*l.* a year, was included in the sale, ought not to vary the substance of the case.

It was truly said, that there is only the evidence of Mr. Morgan as to the value: but then there is this further piece of evidence, which shows the opinion which Mr. Bruce had of the value of his purchase: for one of the defendant's witnesses proves that, in 1813, the sum of 25,000*l.* was offered for the interests purchased, and that that sum was refused.

In some cases, a question has been made whether the evidence of an actuary, which Mr. Morgan is, should, of itself, be held to be sufficient proof of the value of reversionary interests. I cannot conceive why it should not be considered to be sufficient, when there is nothing to contradict it: and, when I find there is further evidence of the value, which arises from the defendant's own evidence, I think that I am bound to receive the opinion which Mr. Morgan has given as to the value, as being the true value. In the case of Headen *v.* Rosher, which was before the late Lord Chief Baron, he did not think it right to set aside the purchase of a reversionary interest, where the sum that was paid was about two-thirds of the value. But then it must be observed that that case stood on very singular circumstances; that there had been a previous attempt to sell the reversion in question, and some other interest, and a sum of 928*l.* had been bid, and, the title appearing defective, in part, there was a second sale: and, in that case, there was not any advantage taken of the distressed circumstances of the party: and the Lord Chief Baron, after stating that he did not assent to the proposition to be found in Gowland *v.* De Faria, refused to set aside the transaction. In my opinion the judgment in that case is perfectly unimpeachable.

In Nichols *v.* Gould, 2 Ves. 422, Lord Hardwicke refused to set aside a transaction which consisted in the purchase of a reversionary interest: but there the reversionary interest depended on the failure of issue of a party who was alive; and Lord Hardwicke said that it was quite impos-

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sible to make any calculation of the nature of that interest; and that was one of the grounds on which he refused to interfere.

In Moth *v.* Atwood, 5 Ves. 845, Lord Alvanley refused to set aside a purchase of a reversionary interest, for two reasons; in the first place, because the interest had been offered, over and over again, to all the town, before the defendant was induced to buy it on the application of the plaintiff Moth; and, in the next place, because the bill was filed twelve years after the transaction. In the case of Whalley *v.* Whalley, 1 Mer. 436; S. C. 3 Bligh. 1, first the Master of the Rolls, and, afterwards, the House of Lords, refused to set aside the transaction, because, amongst other reasons, the bill was filed forty years after the transaction took place.

In this case I find what I conceive to be gross inadequacy, and also that advantage was taken, by Mr. Bruce, of the plaintiff's distress. That appears from the following circumstances: the agreement having been made, as I understand, verbally only, in March, 1808, it was acted on by Mr. Bruce, (who must have been aware, from the payments he was making, what was the situation of the plaintiff,) by making him small payments from time to time; and so evidently intending to hold him to the bargain which he had verbally made in March, 1808; because no person, ordinarily speaking, could have had the advances made to him, on the footing of the agreement, without feeling himself, in some degree, bound to go on with the agreement; and, in point of fact, the very amount of the sums which are detailed as having been paid, from day to day, at three distinct intervals of time stated in the deed, shows the grinding distress under which Lord Portmore laboured, and the way in which Mr. Bruce thought proper to deal with him whilst labouring under that distress.

The mere fact, that Lord Portmore was not only the heir apparent of his father, but also the expectant heir to a peerage, also brings the case distinctly within the rule laid down by this court, and which is founded on general policy, namely, that this court will not allow the heir of a family of rank to be reduced to poverty and distress by dealing with his expectancies.

It having been attempted to impute delay to Lord Portmore, in applying for the relief which he now asks of the court, I have to observe that his circumstances do not appear to have varied, in the least, from the time the deed was executed in March, 1810, until the death of his father; and, upon the death of his father, he did nothing whatever to give any validity to the transaction. The bill was filed in 1825, and it is impossible to say that there has been any acquiescence in the transaction, or any thing like considerable delay, on the part of Lord Portmore, in coming forward to rescind the transaction; nor has he in any manner confirmed it: and, therefore, the circumstances that occurred in Moth *v.* Atwood, and Whalley *v.* Whalley, and many other cases of the same nature, are totally inapplicable to the present case. My opinion, therefore, on the whole of the case, is, that the plaintiff is entitled to the relief which he asks.

Upon looking into the cases in which bargains of this kind have been relieved against, a great variety of courses seems to have been adopted with regard to the costs; but, considering all the circumstances of this case, and what has been done in former cases, I think that, in that respect, the decree ought to be thus framed, namely, that, there should be no costs up to the hearing; and, following what Lord Thurlow seems to have laid

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down as a rule in the case of Gwynne *v.* Heaton, 1 Bro. C. C. 1, the costs of taking that account, which is necessarily incidental to the relief which the plaintiff asks, must be borne by the plaintiff.

"This court doth declare that the purchase, by Alexander Bruce, in the pleadings named, effected by the indenture dated the 14th day of March, 1810, of the several interests and annuities thereby conveyed, ought to be set aside and annulled: and doth order and decree that it be referred, to the Master in rotation, to take an account of the sum of 15,500*l.*, the consideration for the aforesaid purchase, with interest thereon, at the rate of 5*l.* per cent per annum, from the 14th day of March, 1810, to this time, and also an account of all sums of money, received by the said Alexander Bruce, or the assignees or assignee of his estate and effects, on account of the several interests and annuities conveyed by the said indenture, together with interest upon such sums respectively, at the rate of 5*l.* per cent per annum, from the respective days of the receipt thereof down to this time; and it is ordered that the amount of the account last directed, be set off against the amount of the account first directed. And it is ordered that the balance, (if any,) which shall remain due from the plaintiff upon the account first directed, be paid to the defendant, William Taylor, the assignee of the estate of the said Alexander Bruce as hereinafter-mentioned. But, if there shall be a balance found due to the said plaintiff upon taking the said account, then it is ordered that such balance be allowed to him by the Master in ascertaining the amount due from the said plaintiff on making the inquiry next directed. And it is ordered that the Master do inquire and ascertain whether any and what sum or sums of money is or are due, from the said plaintiff, to the estate of the said Alexander Bruce, for principal and interest, beyond the balance, if any, which may be found due, from the plaintiff, on the before-mentioned accounts. And it is ordered that the amount of such sum or sums, if any, as may be found due from the plaintiff, on making the inquiry last directed, be paid to the said defendent William Taylor, as hereinafter-mentioned. And it is ordered that the said Master do tax, as between solicitor and client, the costs of the defendants, James Gordon, Peter Hyatt and James Anderson, of this suit: and it is ordered that he do tax the costs of the defendant, William Taylor, of this suit, which shall be incurred by him in taking the said accounts, and subsequent to the hearing of this cause. And it is ordered that the 16,058*l.* 5*s.* 11*d.** three per cent bank annuities standing in the name of the accountant-general, in trust in this cause, or so much thereof as will be sufficient to raise the amount of the balance or balances, if any, which shall be found due, from the plaintiff, to the estate of the said Alexander Bruce, on the aforesaid several accounts, and such costs, when taxed, be sold, with the privity of the said accountant-general, and, out of the money to arise by such sale, it is ordered that what, if any thing, shall be ascertained to be due from the plaintiff on the account first directed, and also what, if any thing, shall be found due, from the plaintiff, to the estate of the said Alexander Bruce, on making the inquiry last directed, be paid, to the defendant

* This fund arose from the dividends of the 19,350*l.* four per cents, and of the 38,483*l.* three per cents, which had been ordered, by consent, to be paid into court, by the trustees of the plaintiff's marriage settlement, in consequence of a notice given to him, by the plaintiff, on his father's death, not to pay those dividends to Bruce's assignees.

[Pearson *v.* Cardon.—4 Sim. 218.]

William Taylor: and thereout also it is ordered that the costs herein before directed to be taxed be paid in manner following, &c.; but, in case the money to arise by such sale shall not be sufficient for the purposes aforesaid, it is ordered that the Master do apportion the same according to the amounts of such balances and costs: and it is ordered that the sums so to be apportioned be paid in manner before directed: and it is ordered that what shall remain due after such payments, be paid, by the said plaintiff, to the respective persons before named: but, in case the said bank annuities shall be more than sufficient for the purposes aforesaid, it is ordered that the residue thereof, and any dividends to accrue on the said annuities or the residue thereof, be transferred and paid to the plaintiff, &c."*

Carrington *v.* Cornock.

4 *Simons*, 217.

THE tithe calf is the tenth in order of birth.

January 21, 1831.

Pearson *v.* Cardon.

4 *Simons*, 218.

A. deposited goods with B., a warehouseman, to await his directions. Afterwards A. directed B. to transfer the goods to C., and to hold them at his disposal: and B. made the transfer accordingly. The goods were then claimed by D. as having been consigned, by him, to A.: Held, that B. was entitled to file a bill of interpleader against C. and D.

January 24, 1831.

THE plaintiffs were co-partners as warehousemen in London. In April and May, 1818, they received, from Messrs. Bize, Bordenave & Co. of London, a large quantity of goods, comprising the ninety-four bags of wool after mentioned, to be deposited in their warehouses, to await the directions of Messrs. Bize, Bordenave & Co., and the plaintiffs were

* The defendant Taylor appealed from this decree: and, on the hearing of the appeal, his counsel contended that the decree was wrong as to the manner in which it directed the accounts to be taken, and the sums found due, to be applied, and that the court ought to have directed that the sums received by Bruce and his assignee should be applied, first, in keeping down the interest of the 15,500*l.*, and then in reduction of the principal: (see the decree, in Bromley *v.* Holland, Coop. C. C. 25;) but in Easter Term, 1832, Lord Brougham, C., affirmed the decree, with costs. See King *v.* Hamlet, *post*. 111.

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to receive the usual charges for warehousing the goods. On the 3d of July, 1819, the plaintiffs received a letter from Bize, Bordenave & Co., directing them to transfer and hold the ninety-four bags of wool, at the disposal of the defendant Fermin De Tastet, reserving to themselves the right of drawing samples. In compliance with this order, the plaintiffs transferred the ninety-four bags of wool, in their books, into De Tastet's name. On the 29th of August, 1819, the plaintiffs received a letter from Augustus Roehm demanding thirty-eight of the bags of wool, (which he described by their marks,) and giving the plaintiffs notice that Roehm was ready to indemnify them against the delivery thereof to him, and that De Tastet had no claim thereto, and that, if the plaintiffs detained or delivered them to any other person, they would be held liable for the consequences; and the plaintiffs, at the same time, received a note from Bize, Bordenave & Co., which was as follows:

"Gentlemen,—We know that the statement in the accompaying notice is correct, and we request you will deliver to, or warehouse in the name of Mr. Augustus Roehm, the wools to which he refers, and we will indemnify you against your doing so."

On the 30th of August, 1819, the plaintiffs received another letter from Bize, Bordenave & Co., undertaking, in case any action should be brought against the plaintiffs, by De Tastet, or any other person, in consequence of the delivery of the thirty-eight bags of wool, to defend such action on their own account, and to indemnify the plaintiffs against all the consequences of such delivery.

On the 27th of October, 1819, the plaintiffs received a notice, from Roehm, claiming the thirty-eight bags of wool, as the agent of Jean Bernard Cardon. That notice was as follows:

"Messrs. Pearson & Price,—Gentleman, as the owner and proprietor of the following wools, viz:

10 bales, marked $\overset{x}{R}$ C
4 - ditto - $\overset{x}{J}$ R
6 - ditto - $\overset{x}{R}$ R
18 - ditto - R $\overset{x}{R}$ R

38 bales, consigned by me to the house of Bize, Bordenave & Co., of this city, and by them placed in your hands, and now remaining in your possession, I do hereby require you to deliver said wools to me, I being ready and now offering to pay to you whatever charges or claims you have upon or against the same; and request you now to state the amount of any such charges and claims, with the particulars thereof. This demand of my wools is preparatory to my commencing an action against you, to recover the same, or the value thereof, which I shall forthwith commence, if you refuse to make the delivery. In order to remove any possible objection on your part to make the delivery to me, I now offer, but without prejudice to the preceding demand and notice, the most clear and undeniable evidence of my right and title to the wool, if you require to see and examine the same.

(signed) "p^{r} pro^{n} J. B. Cardon,
"Roehm."

In consequence of this notice the plaintiff's solicitors wrote to De

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Tastet, on the 6th of November, 1819, stating that Roehm had again applied for the delivery of the wools, and threatened to bring an action, against the plaintiffs, in the event of their refusing to deliver the same, and requested to be informed whether he had any objection to the plaintiffs delivering the wools to Roehm, or intended to persist in his claim. De Tastet, however, would not relinquish his claim, but theatened to enforce it by an action.

The bill, which was filed on the 26th of November, 1819, against De Tastet and Cardon, after stating as above, alleged that 32*l.* 16*s.* 9*d.* were then due, to the plaintiffs, for the warehousing of the thirty-eight bags of wool and other expences relating thereto: that Cardon had commenced an action of trover, against the plaintiffs, to recover the thirty-eight bags of wool, alleging that they belonged to him, and were deposited by him, with Bize, Bordenave & Co., as his agents, or factors, to sell the same; and that Bize, Bordenave & Co. had pledged, or attempted to pledge, the same to De Tastet, and that they had no authority so to do, and that the transfer to De Tastet was wholly void; nevertheless, that De Tastet would not relinquish his claim to the thirty-eight bags of wool, but still continued to insist thereon, and threatened to bring an action, against the plaintiffs, to recover the same. The bill prayed that the defendants might interplead, and settle and adjust their demands to the thirty-eight bags of wool, between themselves.

The defendant, De Tastet, in his answer, said that he and Bordenave, who was his nephew, were the persons who, in 1818 and 1819, carried on business under the firm of Bize, Bordenave & Co., and that, some time before the 3d of July, 1819, differences arose between him and Bordenave; and that, on or about the 3d of July, 1819, he required, from Bordenave, payment or security for a large sum of money, which then belonged to the defendant, as the capital employed by him as a partner in the firm, and also for money lent and advanced, by him, to the firm, and also for his share of profits; and that, thereupon, Bordenave, in part satisfaction of and by way of security for such large sum of money, amongst other things, agreed to transfer into the defendant's name, the thirty-eight bags of wool, and that, in part performance of such agreement, on the 3d of July, 1819, Bordenave, in the name or style of Bize, Bordenave & Co., wrote and sent, to the plaintiffs, the before-mentioned order of that date: that, before the 28th of August, 1819, and before the plaintiffs received the before-mentioned letter and note of that date, the defendant, having been greatly displeased with the conduct of Bordenave, had determined to and had put an end to the firm of Bize, Bordenave & Co. and to his partnership with Bordenave, and, accordingly, on the 25th of August, 1819, he sent, to Bordenave a letter, intimating that, from that day, the defendant dissolved his connexion with Bordenave, as a partner. But that, after the 25th of August, 1819, Bordenave continued to use and sign the firm of Bize, Bordenave & Co., and resisted the payment of what was due, to the defendant, from the partnership, and pretended that the defendant was not a partner in, but a debtor to the firm; and that Bordenave induced Roehm to set up a claim to the thirty-eight bags of wool, and, therefore, the defendant, in September, 1819, filed a bill to have the partnership accounts between him and Bordenave taken, and which bill was still depending: that he believed that, on the 27th of October, 1819, the plaintiffs received a notice in writing, signed, by procuration, Jean Bernard Cardon, from Roehm, claiming the thirty-eight bags of wool.

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The bill was taken, *pro confesso*, against Cardon, who was out of the jurisdiction of the court.

The Solicitor-General and Mr. Jacob, for the plaintiff.

Sir E. Sugden and Mr. Koe, for the defendant, De Tastet:

The question is, whether this can be maintained as an interpleading bill. The firm of Bize, Bordenave & Co., in which De Tastet was a partner, first deposited the wools with the plaintiffs; and then directed them to transfer the wools into the name of De Tastet, and to hold them at his disposal; and the plaintiffs made the transfer accordingly, and thereby acknowledged the title of De Tastet. From the time when the transfer was made, the plaintiffs became the agents of De Tastet: and it is a settled rule, that an agent cannot dispute the title of his principal. This case is precisely the same as Cooper *v.* De Tastet, 1 Tamlyn's Rep. 177, in which case the Master of the Rolls dismissed the bill, with costs, as against De Tastet.

The Vice-Chancellor:—Admitting that the plaintiffs were the agents of Bize, Bordenave & Co., yet here there was a claim made, by Cardon, under a paramount title; and therefore I am of opinion that this is a case of interpleader.*

King *v.* Hamlet.

4 *Simons*, 223.

Injunction granted to restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money.

January 31; February 12, 1831.

THE plaintiff was the eldest son and heir apparent of Lord Lorton. At the commencement of the transaction after mentioned, the only property to which he was entitled, was an annuity of 800*l.* for the joint lives of himself and his father, charged upon estates in Ireland, and a life-interest in the same estates expectant upon his father's death. In 1828, at which time the plaintiff was twenty-five years of age and unmarried, he was desirous of raising a loan of 8000*l.* or 10,000*l.*; and he applied to George Samuel Ford, a solicitor (but who was not the solicitor of the plaintiff's family), to endeavour to procure the loan for him, which Ford undertook to do, and, afterwards, informed the plaintiff that Montague Newland, a solicitor, had promised to procure a loan of 8000*l.* from the defendant, (who was a jeweller and silversmith in Prince's-street, Leicester-square,) upon the security of the plaintiff's annuity and life-interest in remainder, and Ford sent an abstract of the plaintiff's title, to Newland, who was employed, by the defendant, as his solicitor in the

* On the 15th August, 1831, the Lord Chancellor afterwards affirmed the above decision.

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transaction, though he was not his general solicitor, to enable him to prepare the proposed security. The plaintiff afterwards sold his annuity, in two different sums, one of 500*l.* per annum, and the other of 300*l.* per annum, and conveyed them, to the respective purchasers, by deeds dated the 16th of July and 1st of September, 1828. In the course of the transaction, Newland informed the plaintiff that the defendant would not advance him 8000*l.* in money, but was willing to supply him with goods from his shop to that amount, upon the security of his life-interest in remainder and of two warrant of attorneys, to confess judgments against him, in the Courts of K. B., in England and Ireland; and the plaintiff, having acceded to the proposal, he and Ford went, on the 28th of October, 1828, to the defendant's shop, and the plaintiff, with Ford's assistance, selected from the defendant's stock two pairs of diamond ear-rings, a gold and diamond bracelet, three diamond necklaces, a ruby and diamond suite, a suite of pearls, a diamond cross and comb, two gold watches, and four gold chains, a gold and diamond snuff-box, three gold snuff-boxes, and other articles of jewellery and silver plate, amounting, altogether, at the shop-prices, to 8000*l.*: and Newland, at the same time, attended with the securities, which the plaintiff executed. Shortly afterwards judgments were entered up, upon the warrants of attorney; but, though the goods were set apart for the plaintiff, they were not delivered to him until the 25th November, 1828, the defendant having, as he alleged in his answer, retained them in his possession until the completion of the transaction by the registration of the mortgage-deed in Ireland.

That deed, as well as the other securities, was dated the 28th of October, 1828, and was made between the plaintiff, of the one part, and the defendant, (who was therein described as of Cavendish-square, Esq.,) of the other part: and, after reciting the indenture under which the plaintiff had become entitled to the annuity of 800*l.* and the life-interest in remainder in the Irish estates, and the indentures of the 16th of July and 1st of September, 1828, by which the plaintiff had disposed of the annuity, and also that the plaintiff was justly and truly indebted to the defendant in the sum of 8000*l.*, and that it had been agreed that the 8000*l.*, with interest, should be secured, by a conveyance of the plaintiff's life-estate in remainder, as therein mentioned, and that two policies of insurance for 5000*l.* and 3000*l.* should be effected upon the plaintiff's surviving his father, but in the name of the defendant, and that the plaintiff should pay the premium on those policies, which should be a further security for the principal and interest: it was witnessed that in pursuance of such agreement, and in consideration that the plaintiff then stood well and truly indebted, to the defendant, in the full sum of 8000*l.*, the plaintiff conveyed all the said estates and hereditaments unto the defendant, during the life of the plaintiff, without impeachment of waste, subject to a proviso for redemption, on payment of the 8000*l.*, with interest at five per cent, at the times following, that is to say, 200*l.* being one half-year's interest, on the 28th of April then next, the like sum on the 28th October, 1829, and the like sum on the same day in every succeeding year, until the 28th of October 1832, when the principal and the interest then due thereon were to be paid. And, if default should be made in payment of the 8000*l.* and interest, the defendant was empowered to sell the estates, and to retain the amount out of the proceeds: and the plaintiff covenanted to pay the 8000*l.* and interest, and also the premiums

on the policies; and that, if the plaintiff neglected to pay the premiums, the defendant might pay them, and tack the amount, not exceeding 2000*l.* to the 8000*l.*

On this deed there was indorsed a receipt, signed by the plaintiff, for 8000*l.*

On the 26th of November, 1829, Ford, by the plaintiff's direction, placed the goods in the hands of George Robins, an auctioneer, who advanced the plaintiff money on them, and took from a him bill of sale, and, in March, 1829, Robins sold the goods by auction, for different sums, amounting in the whole, to 3482*l.*; and after deducting ten per cent for his commission, and 400*l.* charged, by Newland, for preparing the securities and for commission on 8000*l.*, Robins paid over, to the plaintiff, 2730*l.*

In February, 1829, the plaintiff filed a bill against the defendant, for the purpose of rescinding the transaction above detailed; but being unable, for want of funds, to proceed with the suit, the defendant, in July, 1829, procured the bill to be dismissed. In December, 1829, the plaintiff married a lady of rank and fortune, upon which occasion his father made a suitable provision for him; and thereby the plaintiff, as the bill alleged, became enabled to enforce his equity against the defendant.

The bill, which was filed in July, 1830, charged that the transaction between the plaintiff and the defendant, was not in the nature of a *bonâ fide* sale, but in that of a loan, (the said goods being substituted for money,) and that the defendant, at the date and execution of the securities for the 8000*l.*, knew that the plaintiff had no occasion for the goods, and did not intend to keep them, and that the plaintiff's object was to raise a sum of money, by way of loan, from the defendant: that the plaintiff was in embarrassed circumstances, at the time of the transaction, and was driven to raise money, without the knowledge of his father and family, as was well known to the defendant: that the transaction was wholly managed, by Ford, on behalf of the plaintiff, and by Newland, on the behalf of the defendant, but that Ford was not the solicitor of the plaintiff's family, and that Newland was not the general solicitor of the defendant: and that, at the time of the transaction, the defendant knew that the plaintiff's father was a nobleman of large property. The bill prayed that the defendant might be decreed to deliver up the securities for the 8000*l.*, to be cancelled, and to enter up satisfaction on the judgments, upon payment of the 2730*l.*, and that the defendant might be restrained from all proceedings against the plaintiff, in respect of the 8000*l.*, and from disposing of the securities.

The defendant, by his answer, which was filed after the notice of motion had been given, said that, in August and September, 1828, he heard that the plaintiff was in want of money, and was desirous of raising a loan; but he denied that he ever promised to advance money to the plaintiff, and said that he had refused to have any dealings with the plaintiff, without the sanction of the plaintiff's father, and that he was informed and believed that plaintiff's father knew and approved of the proposed transaction between him and the plaintiff, and that he, thereupon, consented to supply the plaintiff with shop-goods, to the amount of 8000*l.*, on the terms proposed. He admitted that the goods constituted the sole consideration for the securities. He said that the transaction was in the nature of a *bonâ fide* sale, and not of a loan, and that the goods were not substituted for money. He denied that, at the

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date and execution of the securities, he knew, or had any reason to believe, that the plaintiff had no occasion for the goods, or that he did not intend to keep them, or that the plaintiff's object was to raise money by means thereof, for that the defendant had been informed, by his shopman, that Ford and the plaintiff selected such goods as would be useful on plaintiff's marriage, and that, at the time of such selection, they frequently mentioned such marriage; that many of the articles were made expressly according to the plaintiff's order, and that he stated, when he ordered them, that they were necessary for him to have upon his marriage: that he believed that the plaintiff was in embarrassed circumstances at the time of the transaction. He admitted that Newland was not his general solicitor, at the time of the transaction, and that he employed another solicitor to put in his answer to the plaintiff's first bill; but that no other solicitor than Newland was consulted by him in the transaction. He believed that the plaintiff was, at the time of the transaction, unmarried, and that his father was a nobleman of large property.

The defendant, in one of the schedules to his answer, set forth a copy of certain questions which had been sent by Newland, to James Ferrall, Esq., (who had acted in the transaction as a friend of the plaintiff and his father,) and the answers returned thereto: and the same questions and answers were set forth in Mr. Newland's affidavit.

They were as follows:—"Did you not introduce Mr. King's matter to me?—I did. Did I not meet Lord Lorton with you, at the Military Club; and did you not introduce me to him; and was he not satisfied with the plan?—He was. Did you not urge me, repeatedly, to complete the business with Mr. Hamlet to save the estate, and did not Lord Lorton approve of the measure, and was he not, as well as his solicitor, Mr. Fox, apprised of the transaction from beginning to end?—They were. Did you not know that Mr. King wished to deal with Mr. Hamlet, and that it was, at his request, and on your representations, as Lord Lorton's friend, that he consented to entertain the business?—Before the business was entered into by Mr. Hamlet, he required the sanction of Lord Lorton, which I procured by letter. Were you not, or did you not consider yourself a friend of the family, and did not Lord Lorton express to you his approval of my conduct?—He did."

A motion was now made, by the plaintiff, for an injunction, according to the prayer of the bill, upon his paying, into court, the 2730*l.*

The answer, which was filed after the notice of motion had been given, was read, as an affidavit, for the defendant. Mr. Newland also made an affidavit, by which he represented that the plaintiff's father, and Mr. Serjeant Lefroy, and his son, Mr. A. Lefroy, who were friends and connexions of the plaintiff's family, had been informed and approved of the transaction between the plaintiff and the defendant. It appeared, however, by the affidavits made by those two gentlemen, and by the plaintiff's father, that they were not informed of the real nature of the transaction, but were led to believe, by the communications that were made to them, that the plaintiff was treating, with the defendant, for a loan of money; and that they had no suspicion that the transaction related, in any manner, to the purchase of goods.

Sir Edward Sugden and Mr. B. Parry, for the plaintiff, in support of the motion:

The plaintiff is the expectant heir of a nobleman. At the time he

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engaged in the transaction to which the bill relates, he was only twenty-five years of age: and, before the transaction was concluded, he had disposed of the whole of his property in possession, as was well known to the defendant. The deeds by which the plaintiff's annuity had been conveyed, are recited in the mortgage-deed. It is, on the face of it, a security for money advanced: not a word is said, in it, about goods. The defendant admits that he knew that the plaintiff was in want of money. He states, in his answer, that he had never employed Newland, as his solicitor, except in this matter. If it was a fair transaction, why did he place himself in the hands of an individual of whom he had previously known nothing; and why was the real nature of the transaction suppressed in the deed? Although the interest began to run from the date of the mortgage-deed, the goods were not delivered until some time in the following month: the securities therefore are void, as being usurious.

The defendant was well aware that he was selling, to the plaintiff, goods which were not necessary for his state and condition in life; for he knew that the plaintiff had no property in possession, and that necklaces and other trinkets were useless to a man. The plaintiff and his solicitor were the only persons present at the selection of the goods. The loss on the sale was immense, and it ought to be borne by the defendant; for the sale ought to be considered as his, and not as the plaintiff's. Barker *v.* Vansommer, 1 Bro. C. C. 149.

Mr. Knight and Mr. Stuart, for the defendant:

The transaction in question was not a sale of a reversionary interest, but merely a security for money due. The defendant refused to entertain any application for a loan of money, or to have any dealing with the plaintiff, unless his father was informed of it. In point of fact, the plaintiff's father was informed of it: for Newland swears that he communicated, to Mr. Serjeant Lefroy and Mr. A. Lefroy, who were the friends and agents of Lord Lorton, that the dealing was to be for goods: and the only ground of equity upon which the bill is founded is, that they did not understand what they were to treat about. Mr. Serjeant Lefroy, on perusing the draft, must have seen that the security was not intended to be given for an immediate advance, but for a pre-existing debt. The recital is: "Whereas the said R. King is justly and truly indebted to the said T. Hamlet in the sum of 8000*l.*"

This case does not fall within the principle of the cases in which relief has been given to expectant heirs. The plaintiff was of a mature age, and had the assistance of his solicitor and friends. His father was brought into communication on the subject of the transaction. He selected competent agents, who were informed that the transaction was not a loan of money, but a purchase of goods. The privity of the agent is the privity of the principal; and the defendant ought not to suffer, because the agents did not communicate the nature of the transaction to their principal.

A sale by auction is not a fair criterion of the value of shop-goods. It is sworn that the goods were all charged at the fair shop-prices. Some of the goods were made according to the plaintiff's order: he admits that he is unable to return them to the defendant, and he does not offer to pay even what they produced at the auction. Barker *v.* Vansommer is not like this case; for there the plaintiff's father was not privy to the transaction, and the goods were alleged to have been sold for greatly more than their value.

[King *v.* Hamlet.—4 Sim. 223.]

The Vice-Chancellor:—The question, in this case, is, whether it is to be inferred, from the circumstances now before the court, that the transaction in question was a *bonâ fide* sale of goods, in the ordinary course of Mr. Hamlet's trade; or whether the goods were supplied, by Mr. Hamlet, with the knowledge that they were to be used by Mr. King as the means of raising money.

[His Honour, after observing that Mr. Hamlet admitted, in his answer, that Mr. Newland was not his general solicitor, here read that part of Mr. Newland's affidavit, the object of which was to show that the plaintiff's father knew and approved of the transaction: and his Honour then proceeded thus:]

Mr. Newland then says that, on the 5th of September, 1828, Mr. Serjeant Lefroy and Mr. A. Lefroy, who are friends and connexions of the plaintiff's family, called on him, and entered into conversation with him, respecting the transaction between the defendant and the plaintiff, and that he then gave, to Mr. Serjeant Lefroy, the draft of the mortgage-deed, for his perusal, and that, whilst that gentleman was occupied in reading the draft, he, the deponent, stated distinctly, to Mr. A. Lefroy, that the transaction was for goods.

Now it is observable that Mr. Newland begins with stating that the original proposition was to raise money by way of loan. And then he gradually represents that the matter took a different turn, and that it became, eventually, a transaction which included the advance of goods: and then he adds that he produced the draft of the mortgage-deed, to Mr. Serjeant Lefroy. With respect to that deed it is observable that, if the agreement between the parties was that Mr. Hamlet should advance, either the whole, or even part of the consideration, in goods, that instrument, for reasons best known to Mr. Newland, did not state what the real transaction was. No person, however experienced, could have read that deed without thinking that it was a security for money advanced. That deed, after noticing the settlement, recites that, "the said Robert King is justly and truly indebted to Thomas Hamlet in the sum of 8000*l.*, &c." Now Mr. Newland does not state that he represented to Mr. Serjeant Lefroy, who was reading the deed, what the transaction was, but that he represented it to Mr. Anthony Lefroy, (who is not stated to be a professional man,) whilst his father, who is a lawyer, and an experienced person, was looking at the proposed security.

Mr. Serjeant Lefroy states that, on the 5th of September, he had an interview with Mr. Newland; in the course of which Mr. Newland informed him that the defendant was to advance the plaintiff a considerable sum of money, the precise amount of which he does not recollect, on the security of a conveyance, by way of mortgage, of the plaintiff's interest in a family estate, or to that or some such effect. Then he states that neither Mr. Newland, nor any other person, informed him that the consideration for the intended mortgage, or any part thereof, was to be formed of goods sold, by the defendant to the plaintiff, or to be made up in any other manner than by an advance of money.

It is perfectly clear, from Lord Lorton's affidavit, that his lordship had no other notion, from the beginning to the end of the business, than that his son was entering into some negotiation for a loan of money, and that he never had the least suspicion that it was in the contemplation of any of the parties that any security should be given for money to be advanced in the shape of goods. Mr. Anthony Lefroy states that he has no recollec-

tion, and does not believe that he, at any time, made any communication, to Lord Lorton, as to goods having formed the consideration for, or having been in any manner connected with the mortgage. He adds that he did not take an active part in the conversation that took place at the interview with Newland, or interest himself in the matter, and that he has no recollection whatever that Newland then, or at any other time, informed him, or gave him any reason to suspect that the consideration for the intended mortgage was to be formed of goods.

With respect to this part of the transaction my belief is that no communication was made, either to Lord Lorton, Mr. Serjeant Lefroy, or Mr. Anthony Lefroy, that the consideration was to be such as Mr. Newland represents that he informed Mr. Anthony Lefroy it was to be; and what those gentleman state in their affidavits, is confirmed by the frame of the deed which was prepared by Mr. Newland himself.

Mr. Hamlet, in his answer, denies that the transaction, was in the nature of a loan, or that the goods were substituted for money; or that he had any reason to believe that the plaintiff had no occasion for the goods, or did not intend to keep them, or that his object was to raise money by means of them; and then, as a reason for his not believing that the plaintiff's object was to raise money, he adds that Ford and the plaintiff selected such articles as would be useful on the plaintiff's marriage, and that, at the time of such selection, they frequently mentioned such marriage. This appears to me to be a very weak and insufficient reason, and inconsistent with the whole of the circumstances detailed by Mr. Newland.

I observe that, by way of fortifying the case which Mr. Newland states, there are appended, to his affidavit, certain questions which were put, by him, to Mr. Ferrall. But it is quite clear that those questions did not represent to Mr. Ferrall, what the transaction really was; but that they represented it as being, that which Lord Lorton states he understood it to be, namely, a transaction for a loan of money; and it was under that impression that Lord Lorton gave his consent. I cannot, therefore, but think that these questions and the answers to them have been brought forward with a view to conceal, by a flimsy veil, the justice of the case.

On the 28th of October the deeds were executed, without any delivery of goods; and, what appears to me to show the *mala fides* of the transaction, on that very day, Mr. Hamlet, contrary to the truth of the case, as he represents it himself, took, from Mr. King, a receipt on the back of the mortgage-deed for the sum of 8000*l.* The consequence, therefore, is, that the deed not only did not show, in the body of it, what the transaction was, but the receipt on the back of it would tend of itself to mislead. If Mr. Hamlet believed that the plaintiff wanted the goods for his own use, and, especially, if he believed that he wanted them for his marriage, it would have been but fair to have let him have them, when he executed the securities. But they were not delivered till the 25th of November.

The plaintiff's age does not exceed twenty-seven years, but that is not material: it is clear that he was in a state of distress; that he had no property in possession; and that, without his father's privity, he purchased goods for the purpose of raising money by the sale of them, and made his reversion a security for the price, which, I admit, was the fair shop-price.

It has been said, however, that the plaintiff is not entitled to the relief which he asks, because, in February, 1829, he filed a bill to rescind this

transaction, and that, in July, 1829, that bill was dismissed, for want of prosecution. It does not, however, appear that, at that time, Mr. King had funds that would have enabled him to meet the necessary expenses of the suit. In December, 1829, he married, and then he acquired property which enabled him to file another bill. The dismissal of the first bill having taken place under the circumstances which I have alluded to, ought not to prejudice the plaintiff's right to be relieved in this suit. The question then is, whether the injunction ought to be granted, upon his paying the produce of the goods into court. My opinion is, that Mr. Hamlet and his agents must have known that the object of this young man was to raise money by means of the goods; and that this case is governed by Lord Thurlow's decision in Barker *v.* Vansommer: and, therefore, upon the plaintiff paying the 2730*l.*, and also the 400*l.* into court, or to Mr. Hamlet, personally, if he chooses to receive them, the injunction which is asked for must be granted.*

The Attorney-General *v.* Ellison.

4 *Simons*, 238.

The object of the suit was to set aside certain long leases granted in 1740, and which became vested in the defendant, who had made family settlements of them, which he admitted to be in his custody: Held, that the plaintiff was entitled to a production of those settlements.

February 17, 1831.

BY an act of Parliament passed in the reign of Charles the Second, for cleansing and improving the navigation of a certain river, or navigable channel in Lincolnshire, called Fossdike, the corporation of Lincoln were empowered to undertake the work, in case they thought proper so to do, and the undertakers were empowered to demand such tolls, from persons using the navigation, as should be assessed and appointed by the commissioners named in the act.

On the 4th of October, 1671, the corporation of Lincoln became the undertakers of the work; and, on the 10th of the same month, the commissioners appointed the tolls to be taken by them. In September, 1740, the navigation being out of repair, the corporation demised two-thirds of the navigation and tolls, to Richard Ellison, of Thorne, for nine hundred and ninety-nine years, at the rent of 50*l.* per annum, and Ellison covenanted with the corporation, to repair and maintain the navigation; and the corporation covenanted that the tolls should not be reduced, at any time during the term, without Ellison's consent. By an indenture of the 1st of August, 1741, the corporation demised the remaining one-third of the tolls to Ellison, for nine hundred and ninety-nine years, at the rent of 25*l.*, and subject to the like covenants as were contained in the former lease.

Ellison died in 1743, and, upon his death, Richard Ellison, his son,

* On the 28th of May, 1831, the above decision was affirmed by the Lord Chancellor. See The Earl of Portmore *v.* Taylor, *Ante*, 92.

[The Attorney-General *v.* Ellison.—4 Sim. 238.]

became entitled to the leases. Richard Ellison, the son, died in 1792; and, under the dispositions contained in his will, the two terms of nine hundred and ninety-nine years became vested in the defendant Henry Ellison for life, with remainder to his eldest son, the defendant Richard Ellison, absolutely.

The information was filed against Henry Ellison and Richard his son, the corporation of Lincoln, the acting commissioners under the act, and certain other persons. It charged that the leases were not warranted by the act, and were therefore void; that the defendant, Henry Ellison, had, in his custody, various deeds, &c., relating to the matters therein mentioned, and it prayed that the leases might be set aside.

Henry Ellison, in the schedule to his further answer, set forth a list of a great number of deeds and other documents, and, among them, of four deeds, dated in 1810, 1814 and 1828, (which were also described by the names of the parties,) with the following note annexed: "The four last instruments are the family settlements of this defendant and Richard Ellison, and relate to estates of great value wholly unconnected with the navigation of Fossdike, or any of the matters in the information mentioned:" and, in the body of his further answer, he submitted that he ought not to be compelled to produce any of the documents mentioned in the schedule; but he said that certain of the parties to the four deeds before mentioned, whose names he mentioned, were interested in the navigation and the terms for nine hundred and ninety-nine years.

Mr. Pepys and Mr. Crombie, for the relators, now moved that Henry Ellison might be ordered to produce the four deeds, dated in 1810, 1814 and 1828, and that the relators might be at liberty to peruse the same, and to take copies thereof, so far as they related to the matters in the information mentioned, or to the interests which any persons whatsoever took in the navigation, or in the terms of nine hundred and ninety-nine years. They said that it appeared, by the description of the deeds in the schedule, that they were assignments of the leases for nine hundred and ninety-nine years; and that the object of the motion was to ascertain whether there might not be other persons who were parties to, or claimed under those deeds, besides those named in the answer, who were necessary parties to the suit.

The Solicitor-General and Mr. Knight, for the defendant Henry Ellison, opposed the motion on the ground that the deeds were part of the defendant's title-deeds, and cited Lady Shaftsbury *v.* Arrowsmith, 4 Ves. 66.

The Vice-Chancellor:—The information in this case is filed for the purpose of setting aside two leases for nine hundred and ninety-nine years, granted by a corporation, of certain tolls: and the defendant having, by his answer, stated that he has, in his possession, four deeds relating to the leases, and dated in the years 1810, 1814 and 1828, a motion is made, on the part of the Attorney-General, that those deeds may be produced. It is met by alleging that the deeds, though they relate to the leases, in fact, tend only to show the interest of the defendant and of persons claiming under him; and that, though the Attorney-General has a right to see the leases, he has no right to see the subsequent deeds, which, it is said, relate only to the defendant's title. It is to be observed, however, that the Attorney-General claims to have the tolls free from the leases; and, if he succeeds, every portion of the legal estate

in the terms for nine hundred and ninety-nine years, must be assigned or surrendered, so that the leases may be no longer set up. He, therefore, has a direct interest in the deeds in Mr. Ellison's possession. They do not relate solely to any separate and independent title of the defendant; and, therefore, they must be produced.

Tucker *v.* Wilkins.

4 *Simons*, 241.

IN a suit for tithes by a rector against occupiers, the defendants pleaded a modus to be payable to the vicar, for the tithes claimed: Held, 1st, that a copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff, (the bishop's registry having been searched, for the original, without success,) and that no search was necessary, either in the Augmentation Office, or in the vicar's house, although it was expressed, in the instrument, that one part of it was to remain with the vicar. 2d. That a terrier appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose hand-writing was proved, and by the church-wardens, was admissible, for the plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. 3d. That the decrees, but not the interrogatories and depositions, in two former suits, one in the exchequer, and the other in chancery, for the tithes of a particular farm in the parish, but which was not included in the present suit, were admissible for the defendants.

Bishop Wells's *Liber de Ordinationibus Vicariorum*, received in evidence.

February 14, 25, 1831.

Wilmot *v.* Maccabe

4 *Simons*, 263.

Defendant brought an action, for a libel, against the plaintiffs; the plaintiffs pleaded a justification, and filed a bill for discovery, and a commission to examine witnesses abroad in support of their plea. The defendant pleaded, to the bill, that he had discontinued the action. Plea overruled, as defendant might commence another action. But upon defendant afterwards undertaking not to bring any other action and to pay the costs of the suit, all further proceedings were staid.

March 2, 1831.

THE bill was filed for a discovery and commission to examine witnesses abroad in support of the pleas in justification, which the plaintiffs had

[Wilmot *v.* Maccabe.—4 Sim. 263.]

pleaded to an action for a libel, which the defendant had brought against them in the Court of King's Bench, and for an injunction to restrain the defendant from proceeding with the action, or commencing any other action, against the plaintiffs, in respect to the matters contained in the bill. The defendant put in a plea to the bill, which was, in substance, that the action had been discontinued, and was at an end, and that there was not any action at law depending, between the defendant and the plaintiffs, in respect of which the discovery sought by the bill could be of any use; that, by an order of the Court of King's Bench, it was ordered, upon payment of the costs to be taxed by the Master, that the action should be discontinued: and that the plaintiffs' costs of the action had been taxed, by the Master of the Court of King's Bench, and the amount thereof paid by the defendant.

The Solicitor-General and Mr. Roupell for the defendant, in support of the plea, said that, as there was no action pending between the defendant and the plaintiffs, the discovery and commission could be of no use: that the bill did not allege that the defendant had any intention to commence another action: and that, therefore, the case was, in effect, the same as if no action had been ever brought.

Sir E. Sugden, Mr. Wakefield and Mr. Pattisson appeared for the plaintiffs, in support of the bill. But the Vice-Chancellor, without hearing them, said that the bill sought to restrain, not only the action that had been commenced, but also all actions that might be commenced, by the defendant, against the plaintiffs, in respect of the alleged libellous matter: and that, as the plea did not aver that the defendant had released the plaintiffs from all actions, it must be overruled.

Plea overruled: but the defendant was allowed till the end of the ensuing term to put in his answer.

May 5.—The defendant having executed and tendered, to the plaintiffs, a release of all actions, (which, however, the plaintiffs refused to accept,) now moved, upon an affidavit stating the execution and tender of the release, and that he did not intend to bring any other action against the plaintiffs, for the alleged libel, that all further proceedings in the suit might be staid.

The Solicitor-General and Mr. Bligh, in support of the motion, said that the court had no jurisdiction to compel a discovery from a defendant, in a case like the present, unless an action was either pending or threatened by him against the plaintiff: that the plaintiffs, in this case, had now nothing to defend themselves against; and that, therefore, the defendant ought not to be subjected to the trouble of answering the bill: and that the plaintiffs had the further protection of the injunction which they had obtained, and which the defendant did not seek to dissolve.

Mr. Knight, Mr Wakefield and Mr. Pattisson, for the plaintiffs, said that the motion was a mere experiment; that a party who has been brought into a court of law, has a right to defend himself in whatever manner he thinks proper: that, if the plaintiff in an action for libel, were to apply, to a court of law, to compel a defendant to plead the general issue, instead of a justification, he would not be listened to: that, though the plaintiffs, in this case, had pleaded the general issue, as well as the pleas in justification, to the declaration, they could not give the release in evidence under the plea of the general issue, but must plead it specially: that, if the plaintiffs had accepted the release, they would have acknowledged that there was a right of action: that the defendant might, at any

time, bring another action against the plaintiffs; especially if they were to republish the alleged libel: but that, if the plaintiffs obtained the discovery from the defendant, it would be a defence to all future actions.

The VICE-CHANCELLOR:—In Shackell *v.* Macaulay, 2 Russ. 550, note; and 1 Bligh, new series, 96; the defendant had brought an action, for a libel, against the plaintiff, and the plaintiff filed a bill for a discovery, and for commissions to examine witnesses abroad, in aid of his defence to the action, which were resisted by Mr. Macaulay, on account of the special nature of the libel. But Lord Eldon, C., and the House of Lords, on appeal, decided that, where a person brings an action for a libel, it follows, as commensurate with the right to bring the action, that the party who complains, is bound to give the discovery which the defendant at law claims to have by his bill. But that obligation exists only where the party libelled has brought, or threatened to bring the action. For, if a person who has published a libel, were to be permitted, on the mere assumption that an action would be brought against him, to file a bill of discovery against the party calumniated, he would have it in his power to put that party to the torture of answering, on oath, as many questions as he might think proper to put into his bill. I apprehend, therefore, that, where no action has been brought, or where an action has been brought and afterwards abandoned, and no other action is intended to be brought, the publisher of the libel ought not to be allowed to prosecute his bill of discovery.

I think, therefore, that I am bound to grant this application, as a matter of right, upon Dr. Maccabe undertaking not to bring any action upon the present publication, and paying the costs of the suit, including the costs of the present application.

The order made was as follows: "This court doth, by consent, order and decree that the injunction obtained, in this cause, by the plaintiffs, pursuant to an order dated the 22d day of November, 1830, be made perpetual. And it is ordered that it be referred, to the Master of this court in rotation, to tax the plaintiffs their costs of this suit, and of this application: and it is ordered that the defendant do pay such costs, when taxed: and it is ordered that all further proceedings to obtain an answer, from the defendant, to the plaintiffs' bill, be staid."

Rowe *v.* Anderson.

4 *Simons*, 267.

A. and B. entered into partnership as brewers, A. bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, &c. at a valuation; but the amount was not to be paid till the mortgages were satisfied. B. becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages: Held, that the assignees were entitled to deduct the sums paid by them, from the dividends on the sum which was due to A. from B., at the time of his bankruptcy.

March 10, 1831.

IN 1800, Henry Bullock being possessed of a leasehold dwelling-house and brewhouse, in Whitechapel, called the Swan Brewhouse, with the plant and utensils therein, and of other leasehold property and stock (wherein and wherewith he had carried on the business of a brewer) subject, however, to certain mortgages for securing sums of money, to some of his brothers and sisters, agreed to enter into partnership, in the trade of a brewer, with John Anderson, Alexander Anderson, and William Watson; and, accordingly, articles of partnership, dated the 24th of December, 1800, were entered into between them, whereby, after reciting that Henry Bullock having made up, to the 24th of June then last, an account or rest and valuation of the capital stock belonging to, and employed by him in the said trade, and of the debts owing by him, it appeared that such capital stock in trade, including the plant of his brew-house, and his several leases and leasehold premises, amounted to the clear sum or value of 16,532*l.* 14*s.* 5*d.* beyond the amount of the debts owing by him in his trade; but that, besides those debts, he owed certain family debts, amounting to 19,528*l.* 2*s.*, for which he paid interest at five per cent per annum, and that, for securing 16,528*l.* 2*s.*, part of the 19,528*l.* 2*s.*, his leasehold estates and plant stood charged and liable, and that, having occasion for the assistance of partners who could bring in capital into the trade, John Anderson, Alexander Anderson, and William Watson, had agreed to become partners with him, for twenty-one years, from the 24th of June then last; and that it had been agreed that the capital to be employed in the trade should consist of the clear sum of 40,000*l.*, and that the said co-partners should contribute such sum in the same proportions in which the profits of the trade were agreed to be shared, that is to say, Henry Bullock, three-sixth parts of the whole, John Anderson, one-sixth part, Alexander Anderson, one sixth-part, and William Watson the remaing sixth part; but that, inasmuch as Henry Bullock had not then the means of bringing in any other capital or sum, towards his proportion of the joint stock, than the 16,532*l.* 14*s.* 5*d.*, the amount of his balance on the then last annual rest, which the parties agreed to accept, as being of that clear amount or value, and that, inasmuch as the amount or value of the 16,532*l.* 14*s.* 5*d.* was liable to be called out, or

[Rowe *v.* Anderson.—4 Sim. 267.]

diminished by the payment of the family debts or the interest thereof, and that, inasmuch as William Watson was then unable to bring, into the joint stock, any greater sum than 2000*l.*, John Anderson and Alexander Anderson had agreed to advance and bring, into the joint trade, the sum of 10,000*l.* each, and to be considered as creditors, on the co-partnership capital, for so much of the respective sums of 10,000*l.* and 10,000*l.* as exceeded their share of such joint stock; and that it had also been agreed that the leasehold premises, and the leases thereof, and the other stock which Henry Bullock was entitled to, should be assigned so as to vest the same in John Anderson, Alexander Anderson and William Watson jointly with Henry Bullock, as part of the capital of their partnership business: it was witnessed that the parties agreed, with each other, to become partners, in the said trade, for twenty-one years, from the 24th of June then last; and that, once in every year, an annual rest or valuation of the whole stock, property, effects and debts of the co-partnership should be made up to the 24th of June in each year, and that, upon the making up of the said account, John Anderson and Alexander Anderson should, in the first place, be allowed to take credit for interest at five per cent upon so much money as they should appear to have in the trade beyond their respective capital sums of 6666*l.* 13*s.* 4*d.* each, and then that the profits which should appear to have been made during the preceding year, should be carried to the credit of the parties in manner following: (that is to say) that each of the parties should take credit for interest at five per cent per annum, upon the amount of capital which he should appear to have had in the joint trade for the year preceding, and then the surplus of such profits should be divided into six equal parts, and three of such six parts should be carried to the account of Henry Bullock, and that he the said Henry Bullock, should be allowed to draw thereout the annual sum of 500*l.* for the maintenance of himself and family, and also so much as should be sufficient to enable him to keep down the interest on the said debts amounting to 19,528*l.* 2*s.*, and that the surplus, if any, of Henry Bullock's share of the profits should be retained in the trade, by way of addition to his share of the capital, until the 16,532*l.* 14*s.* 5*d.* should be made up to the full sum of 20,000*l.*, and until a fund should be raised sufficient to discharge his debts, amounting to 19,528*l.* 2*s.*, or such debts should be otherwise satisfied and discharged. And it was further agreed that, if either of the partners should die, the survivors might, if they should think proper, take their deceased partner's share of the capital, stock and effects, upon their paying, to his executors or administrators, such a sum as his share should appear to amount to, according to the annual rest taken up to the 24th of June next preceding his death, together with interest thereon at five per cent, from the time of such annual rest, such money to be paid by instalments, as therein mentioned, and to be secured by the bond of the surviving partners.

In pursuance of these articles, the partnership business was carried on until the 22d of October, 1805, when Henry Bullock retired from the partnership, but the business was afterwards continued by the three other partners; and they agreed to take Henry Bullock's share, upon the same terms as they might have done, under the articles, in case he had died, (that is to say) at the valuation thereof appearing by the rest on the 24th of June, 1805.

Henry Bullock having, during the co-partnership, drawn out large

sums of money for the purpose of paying some of the family debts owing by him, and the interest thereon, and for his maintenance, his share of the capital, stock and effects appeared, on the rest taken on the 24th of June, 1805, to be reduced, in value, to the sum of 9493*l.* 6*s.* 9*d.*, and as his share was subject to the mortgages for his private debts, it could not be taken out of the concern, or be paid for by the continuing partners, till such mortgages were satisfied, or the continuing partners were otherwise indemnified by him.

In December, 1805, Henry Bullock died insolvent, having appointed the defendant Alexander Anderson his executor.

John Anderson, Alexander Anderson, and William Watson continued to carry on the trade until the 24th of April, 1808, when John Anderson died; and afterwards Alexander Anderson and William Watson carried on the trade in copartnership together, until the 28th of February, 1811, when Watson died; and, thereupon, Alexander Anderson continued to carry on the trade by himself, until his bankruptcy, which took place on the 8th of July, 1814, when the defendants, Edward Stewart and Thomas Usborne were chosen assignees of his estate and effects. Prior to the bankruptcy, Alexander Anderson and his copartners had paid and disbursed several sums on account of Henry Bullock, or for the benefit of his estate, amounting to 4095*l.* 9*s.* 1*d.*; and, after the bankruptcy Stewart and Usborne paid sums amounting to 2879*l.* 9*s.* 2*d.* in respect of the mortgage-debts due to Henry Bullock's brothers and sisters.

Six dividends, making together 9*s.* 4*d.* in the pound, had been declared under the commission against Alexander Anderson; but no proof had been made, under that commission, in respect of the debt due from Alexander Anderson, to the estate of Henry Bullock, as such retiring partner as aforesaid.

A suit having been instituted by one of Bullock's creditors, for the purpose of having his personal estate applied in payment of his debts, the Master, by his report made in pursuance of the decree, found that there came to, and remained in the hands of A. Anderson, the executor of Henry Bullock, of the personal estate of Henry Bullock, the said sum of 9493*l.* 6*s.* arising from his share of the capital stock of the copartnership at the dissolution thereof, on the 24th of June, 1805; and that the interest on that sum, from the last mentioned day to the 8th of July, 1814, the date of the commission, together with three further sums which Alexander Anderson had received on account of Bullock's personal estate, added to the 9493*l.* 3*s.* 6*d.* amounted to 13,399*l.* 4*s.* 2*d.* And the Master further found that the 4095*l.* 9*s.* 1*d.* being deducted from the 13,399*l.* 4*s.* 2*d.*, there remained due, from Alexander Anderson, at the time of issuing the commission of bankruptcy against him, the sum of 9303*l.* 15*s.* 1*d.*; and that the dividends of the estate of Alexander Anderson, amounting to 9*s.* 4*d.* in the pound, being computed upon that balance would amount to 4341*l.* 8*s.* 7*d.*, and that the 2879*l.* 9*s.* 2*d.* the amount of the sums paid by Stewart and Usborne, out of the estate of the bankrupt, on account of the estate of Henry Bullock, as the retiring partner, being deducted from the sum of 4341*l.* 8*s.* 7*d.*, the sum of 1461*l.* 19*s.* 5*d.* remained due, in respect of such dividends, from Alexander Anderson's estate.

The plaintiff excepted to the report, insisting that the Master ought to have deducted the 2879*l.* 9*s.* 2*d.* from the 9303*l.* 15*s.* 1*d.*, which would

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leave a balance of 6424*l.* 5*s.* 11*d.*, the dividends on which would amount to 2998*l.*

Mr. Knight and Mr. Ching, in support of the exception, said that Henry Bullock, when he retired from the partnership, sold his share of the capital, to Alexander Anderson and his copartners, and was credited for the price: that Alexander Anderson being a purchaser of the property, he and his assignees had a right to take the mortgages on themselves, and to deduct them from the debt due to the estate of Henry Bullock; that the sums which they had paid, had been paid for the purpose of clearing their own property: that the question was, what was the sum provable at the date of the commission: that the amount which was then provable, was the balance that remained due to Bullock's estate, after deducting the amount of what was due in respect of the mortgages, and that Bullock's estate was entitled to receive, from the estate of Alexander Anderson, 9*s.* 4*d.* in the pound, upon that balance.

Sir E. Sugden and Mr. Barber, in support of the report, said that Bullock's estate was bound to pay off the mortgages; that, after the bankruptcy of Alexander Anderson, when the balance payable to Bullock's estate consisted of dividends, the assignees paid off the mortgage-debts, which were not due from Anderson, but from Bullock's estate; that, therefore, the assignees had performed an obligation to which Bullock's estate was liable; and, consequently, they were entitled to deduct the amount of the moneys so paid by them, from the dividends payable to Bullock's estate.

The Vice-Chancellor:—At the time of the bankruptcy, no proof could have been made, on behalf of Bullock's estate, against the estate of Henry Anderson, unless the obligations to which Bullock was liable, had been performed; that is to say, unless all the mortgages on the brewery, &c. had been cleared off. The assignees would have had a right to insist that those mortgages should be satisfied, before they allowed any proof to be made for the benefit of Bullock's estate. No proof has yet been made: and the effect of the bankruptcy was to convert that which before was a debt of 9303*l.* 15*s.* 1*d.*, into such a sum as the dividends would amount to: and then the assignees apply a sum in satisfaction of the liability, which, until it was satisfied, no demand could have been made against the estate of the bankrupt: and I think that the assignees had a right so to do; and, therefore, this exception must be overruled.

Between the Attorney-General, at the relation of William Dobinson and others, informants, and the Mayor and Corporation of Carlisle, James Willoughby and William Nanson, defendants;

And between the said William Dobinson and others, plaintiffs, and the Mayor and Corporation of Carlisle and the said James Willoughby and William Nanson, defendants.

4 *Simons*, 275.

AFTER exceptions had been allowed to an answer to an information, the court, being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the Attorney-General, to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the suit, in the mean time.

March 21, 1831.

Aberdeen *v.* Newland.

4 *Simons*, 281.

A CLERGYMAN granted an annuity, and secured it by a conveyance of his benefice, and by a warrant of attorney: Held, that the conveyance was void, but the warrant of attorney good.

March 1, 1831.

Drayson *v.* Pocock.

4 *Simons*, 283.

Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees: which was done. The new trustees then sold part of the testator's real estates to the plaintiff, who filed a bill for a specific performance: Held, that the former suit having been dismissed

[Drayson *v.* Pocock.—4 Sim. 283.]

as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates; and that the new trustees had the same power of giving receipts as the original trustees had.

March 5, 1831.

RICHARD PEARCE, by his will dated the 20th of May, 1795, gave his manor of Stanwick, and all his lands in Northamptonshire, to his son Richard Pearce, and died leaving Thomas Pearce, his eldest son, his heir-at-law. Thomas Pearce, by his will dated the 6th of January, 1801, gave all his real and personal estates, to John Crutchfield and John Emmett, their heirs, executors, &c., in trust to sell, and to invest the proceeds in the usual securities, and to assign such securities to his two natural children, Thomas Pearce and Mary Pearce, when they should attain twenty-one; and he directed that the receipts of his trustees should be sufficient discharges to the purchasers. Thomas Pearce died in 1802; and, in Michaelmas term of that year, his two natural children, both of whom were infants, filed their bill, against Crutchfield and Emmett, and also against Richard Pearce, the brother and heir-at-law, and Isabella Pearce, the widow of their late father, praying for the usual accounts of the real and personal estates of their late father, and that his will might be established, and the trusts thereof carried into execution. In 1803, John Locker married Mary Pearce without the consent of the court, and the suit was revived against them. In July, 1804, the cause was heard, and the bill was dismissed as against Richard Pearce, the heir, and Isabella Pearce,* and the usual accounts were directed to be taken of the personal estate of Thomas Pearce. It having been referred to the Master, to approve of a proper settlement to be made, by John Locker, on Mary Locker and the issue of the marriage, the Master, on the 18th of September, 1806, reported that it was believed that, after payment of Thomas Pearce's funeral expenses, and legacies, and the costs of the suit, Mary Locker's fortune would amount to about 15,000*l.*, but that the exact amount could not be ascertained till the accounts directed by the decree were taken, but that he was of opinion that 2000*l.*, part of such fortune, should be paid, to John Locker, and that the residue should be settled, for the benefit of Mary Locker and the children of the marriage, as therein mentioned. By an indenture of the 26th of September, 1806, John Locker, in consideration of the 2000*l.*, assigned and quitted claim, to Crutchfield and Emmett, all his rights to the real and personal estate of Thomas Pearce, the testator, to hold the same, to them, their executors, administrators and assigns, upon the trusts approved of by the Master.

Mary Locker attained twenty-one in 1809; and Thomas Pearce, the son, attained that age in 1810; and, in May of that year, he married Mary Farmer, widow: and, by a settlement dated the 29th of the same month, after reciting that Crutchfield and Emmett had sold a considerable part of the real estates of Thomas Pearce, the testator, and had paid, to Thomas Pearce, the son, about 10,400*l.*, part of his share thereof, and intended to pay the residue, into the Court of Chancery; T. Pearce, the son, assigned, to certain trustees, all money which he was or might be entitled to under the will of the testator, upon certain trusts for the benefit of himself and his wife, and the children of the marriage; and he

* It did not appear for what reason this bill was so dismissed.

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appointed the trustees to be his attorneys, to present any petition to the court, and to do any act requisite to obtain the money so intended to be paid in. In December, 1811, the Master made his report as to the receipts and payments of Crutchfield and Emmett, as the executors of T. Pearce, the testator. Differences having arisen between Mr. and Mrs. Locker, Mr. Locker agreed to permit his wife to live separate from him, in consideration of his being paid the further sum of 1000*l.*, out of her fortune. By an order of the 16th of March, 1812, Crutchfield and Emmett were directed to pay Mrs. Locker 1200*l.*, for her own use. By a deed of separation, dated the 3d of April, 1812, Locker covenanted to permit his wife to live separate from him, and, in consideration of the 1000*l.*, confirmed the settlement of the 26th of September, 1806, and granted and set over, to a trustee for his wife, all the moneys, securities and effects assigned by that settlement, or which Mrs. Locker, or any trustee for her, might become possessed of, in trust for Mrs. Locker's separate use, and, in default of her disposing thereof by her will, in trust for her brother Thomas Pearce, if living, but if dead, then in trust for the next of kin of the testator Thomas Pearce; and Mr. Locker covenanted that the assigned premises, and all other the real and personal estates which Mrs. Locker, or he, in her right, might become seised, possessed of or entitled to, should be held, by the trustee, upon the trusts of the deed: and Locker authorized the trustee to use his name and to appear for him, in all future proceedings in the before-mentioned cause, or in any other cause that might be instituted respecting the trust estate: and it was agreed that if, upon exceptions to the Master's report, or upon the further investigation of the accounts in the cause, any moneys should appear to be coming, to Mrs. Locker, over and above the 15,000*l.*, her husband should receive one half of such excess.

By an order made in the cause, on further directions, on the 15th of July, 1813, the executors were ordered to pay, into court, the balance found due from them, after deducting the payments made to Thomas Pearce and Mrs. Locker, on account of their respective shares thereof, and the Master was directed to certify how much of the residue belonged to Thomas Pearce and Mrs. Locker respectively. On the 28th of May, 1816, Crutchfield, who had survived Emmett, was ordered to pay, to Mrs. Locker, the 1000*l.*, which she had paid to her husband; and it was ordered that that sum, and the 2000*l.* before paid to him, should be taken as part of Mrs. Locker's fortune under her father's will.

After the death of Richard Pearce, the devisee named in the first-mentioned will, Thomas Pearce and Mrs. Locker, having been advised that Richard Pearce took a life-estate only in the estates devised to him, recovered those estates by ejectment, from the persons to whom he had devised them. Crutchfield afterwards died, leaving Samuel Sharpe his heir, and his widow, Anne Crutchfield, and Sharpe his executors: and, in Trinity Term, 1816, Thomas Pearce and Mrs. Locker filed a bill, to have new trustees appointed, under the will of Thomas Pearce, the testator, in the room of Sharpe. The Master having approved of the defendants, Robert Jones and Geo. Pocock, as such new trustees, all the freehold estates then vested in Sharpe, as the heir of Crutchfield, by virtue of the will of T. Pearce, the testator, were conveyed by indentures of lease and release of the 4th and 5th of August, 1817, (which had been settled by the Master,) to Jones and Pocock, and their heirs, subject to the trusts to which the same were subject under that will and the indentures of the

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26th of September, 1806, the 29th of May, 1810, and the 3d of April, 1812.

One of the trustees of the settlement of the 29th of May, 1810, having died, and the others being desirous of being discharged, a suit was instituted by Thomas Pearce and his wife, for the purpose of having new trustees appointed: and, by a deed of the 30th of September, 1818, the premises comprised in that settlement, were assigned to the defendants, Robert Jones and Moses Haughton, the new trustees approved of by the Master, upon the trusts of the settlement.

In January, 1820, Thomas Pearce died, having devised all his real and personal estates, to his wife, for her life, and, after her decease, to her children by her first husband, and appointed her his executrix. Mary Pearce afterwards married the defendant, Robert Jones: and John Locker having died intestate and without issue, his widow married the defendant, George Pocock: but although the suit for the administration of the estate of T. Pearce, the testator, became abated, by the deaths of Locker and T. Pearce the son, and the marriages of their widows, it was never revived.

In July, 1818, William Drage entered into an agreement, with John Morgan, as the solicitor of the defendants Jones and Pocock, the trustees, and of Thomas Pearce, the son, and Mary Locker, for the purchase of the manor of Stanwick; and was afterwards let into possession thereof, on his agreeing to pay interest on his purchase-money. In March, 1822, Drage sold his interest under the agreement, to the plaintiff Drayson, who was accepted, by Jones and Pocock, as the purchasers, and had paid to them interest on the purchase-money.

The bill, in this cause, which was filed in July, 1827, after stating to the effect before-mentioned, alleged that the plaintiff was satisfied with the title to the purchased premises, except that he had been advised that he could not safely pay his purchase-money to Jones and Pocock, the trustees, without the direction of the court, and that their receipt would not be a sufficient discharge to him, by reason of the before-mentioned suits and the proceedings therein, and the premises having been conveyed to the trustees, subject to the trusts of the deeds of the 26th of December, 1806, the 29th of May, 1810, and the 3d of April, 1812; that the plaintiff had requested the defendants, Jones and Pocock, as such trustees, and in right of their wives, to revive the said suit and proceedings, and to enable the plaintiff to pay his purchase-money into court, in order that the same might be applied upon the trusts of the will of Thomas Pearce, the testator, under the direction of the court; but that Jones and Pocock had not only refused to comply with such request, but had recovered, by ejectment, the possession of the premises from the plaintiff. The bill prayed for a specific performance of the agreement, and that the plaintiff might have the benefit of the suit and proceedings for administering the assets and performing the trusts of the will of Thomas Pearce, the testator, to the intent or for the purpose of paying his purchase-money into the court, and having the premises conveyed to him, by all proper parties, and that the plaintiff might be at liberty to pay his purchase-money, and the interest due thereon, into court, and that a conveyance might be executed to him by all proper parties.

The defendants, Jones and Pocock, by their answer, said that the decree in the suit of Pearce against Crutchfield was applicable to the per-

sonal estate only of Thomas Pearce, the testator; and that no order or decree was made in that suit, with regard to the hereditaments conveyed to them in trust, as before-mentioned: and they submitted that, having recovered possession of the premises, by ejectment, the contract was rescinded, and could not be enforced against them; but, if the court should be of opinion that the contract was still in force, then they submitted that the plaintiff had no equity to call on them to revive the said suit and proceedings, but that, having thought fit to take the place of Drage, the plaintiff was bound to pay the purchase-money and interest, to them, the defendants, who, as they submitted, were competent to give a sufficient discharge for the same, by virtue of the will of Thomas Pearce, the testator.

Sir E. Sugden, Mr. Knight and Mr. C. Romilly, for the plaintiff, said that, a suit having been instituted for the purpose of having the trusts of the will of Thomas Pearce performed under the direction of the court, there was *lis pendens* respecting the property, and no valid sale of it could be made, except under the direction of the court: that deeds had been executed, relative to the real as well as to the personal estate of Thomas Pearce, the testator; and the court had taken cognizance of those deeds, and, therefore, had acted on the real estate: that Jones and Pocock were substituted trustees, and were the husbands of parties beneficially entitled: that, under the deeds of lease and release of the 4th and 5th of August, 1817, they were to stand possessed of the moneys to arise from the sale of the real estate, not only upon the trusts of the will of Thomas Pearce, the testator, but upon the trusts of that will, and of the subsequent deeds; and, consequently, that there had been such a dedication of the money adopted by the court, as prevented the plaintiff from paying his money, with safety, to the trustees.

Mr. Treslove and Mr. Skirrow for the defendants, Pocock and wife, Jones and wife, and the children of Mrs. Jones by her first husband, who were all adults when the bill was filed, said that the single question was whether the trustees could give the plaintiff a sufficient discharge for his purchase-money: that it had been argued that the pendency of the suit of Pearce *v.* Crutchfield disabled the trustees from selling the estate; but that the will of Thomas Pearce, the testator, had not been established, and the bill, in that cause, was dismissed as against the heir: that the parties were not then aware that they were entitled to the reversion of the estates devised by the will of Richard Pearce: that the suit had long since become abated, and had never been revived: that the deeds which had been executed, did not effect the legal estate, but only the beneficial interest of Thomas and Mary Pearce: that the conveyance made to Jones and Pocock, upon their being appointed trustees, was incorrect in declaring that they were to hold the premises upon the trusts of the deeds, as well as of the will.

Mr. J. Martin appeared for the defendant Sharpe.

Mr. Monro, for the defendant Astley, the representative of the trustee under the deed of separation: and,

Mr. John Romilly, for the defendant Drage.

The Vice-Chancellor:—The real question in this case is, whether there was *lis pendens* with respect to the real estates of Thomas Pearce the testator. The fact of the deeds having been executed by the *cestuis que trust*, does not at all affect the question.

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In 1802 a bill was filed, by Thomas and Mary Pearce, who were then infants, praying that the will might be established, and the trusts of it performed, under the direction of the court: but, when the cause was heard, the court dismissed the bill as against the heir, and did not establish the will, but made a decree which regarded the personal estate only; and, therefore, there was no general *lis pendens* with respect to the real estate. After the decree in 1804, it was quite out of the power of the court to make any order in the suit, so as to bind the real estates, the heir not being before the court. Therefore, there is no difficulty in the trustees given a sufficient discharge to the purchaser, so far as the objection founded on *lis pendens* is concerned.

I am of opinion also that a good receipt can be given by the new trustees who have been appointed in the room of the heir of the surviving trustee of T. Pearce's will: for the effect of the conveyance to the new trustees was to bind the legal estate, and the decree of the court bound the equity: so that the new trustees had the same power to give receipts, as the original trustees had.

With respect to the costs in this case, the plaintiff must bear the costs of the ejectment brought by Jones and Pocock; as he might have filed his bill, and stayed the proceedings in those actions: but I shall not give the costs of the suit, on either side; for it appears, by one of the orders that was pronounced in the cause of Pearce *v.* Crutchfield, that that cause was treated in that order, as one in which the real assets of Thomas Pearce, the testator, were to be administered: but my opinion is that that cause ought not to have been so considered, and that the order in question was wrong. But, having regard to that order, I think that the question in this suit, was fairly raised.

"Declare that the defendants Jones and Pocock can make an effectual conveyance of the estate and premises comprised in the agreement, to the plaintiff, and that their receipt will be an effectual discharge for the purchase-money. Decree a specific performance of the agreement; an account to be taken of the purchase-money and interest, and of the rents received by the defendants, Jones and Pocock, since they recovered possession of the estate, the amount to be deducted from what shall be found due for the purchase-money and interest, and the balance to be paid, by the plaintiff, to the defendants, Jones and Pocock, upon their executing to him a conveyance of the estate, in which all other necessary parties are to join, and delivering up possession of the estate to him."

Poole *v.* Terry.

4 Simons, 294.

Testator devised real estates to A. for life, remainder to be in fee. And he gave a legacy to C., to be paid to her by B., within twelve months after A.'s death; and he charged his estate with the legacy, and appointed A. his executrix. C. died in A.'s lifetime: Held, that the legacy did not lapse.

March 5, 1831.

JOHN ROBERTS, by his will, after giving some specific and pecuniary legacies, directed that his debts, funeral and testamentary expenses should be paid out of his personal estate; but, in case it should be insufficient, then he gave his estates, called Bromley and Bluckenstone, to certain trustees, for five hundred years from the day of his decease, in trust to raise such sums of money as the product of his personal estate might be deficient in discharging of all his just debts and the legacies given by his will, and, thereby, satisfy and discharge all such parts of his just debts and legacies, as the product of his personal estate should be deficient in satisfying and discharging: and, subject to the said term, the testator devised his estates, called Bromley and Bluckenstone, to his wife, for her life, and, after her decease, to his nephew, the defendant George Terry, in fee: and he devised his estate in the parish of King's Caple, after the decease of his wife, to his said nephew in fee, subject to the payment of two annuities of 50*l.* each, to his nieces Helena and Sarah Terry; and the testator also gave, to them, 1000*l.* a-piece, to be paid, unto them, by their brother, George Terry, within twelve months after the decease of his said wife; and he charged all his estates with the payment of those legacies, and appointed his wife his executrix.

The testator died in 1806. In 1809, Helena Terry married S. Sparkes. In 1810 she died, and her husband became her administrator, and afterwards assigned the legacy of 1000*l.* given to his wife, to persons under whom the plaintiffs claimed. Mrs. Roberts, the testator's widow, died in 1827, whereupon Geo. Terry entered, under the will, into possession of the testator's real estates.

The bill was filed to have the legacy of 1000*l.*, given to Helena Sparkes, raised and paid out of those estates.

The defendant Terry, by his answer, said that he had been advised that the legacy having been charged on the testator's real estates, and not having been made payable until twelve months after the death of his widow, and Helena Sparkes having died long before the widow, such legacy lapsed and sunk into the testator's real estates.

The Solicitor-General, Mr. Treslove and Mr. Whitmarsh, for the plaintiff, cited Emes *v.* Hancock, 2 Atk. 507; Dawson *v.* Killet, 1 Bro. C. C. 119.

Sir Edward Sugden and Mr. Abbott, for the defendant, cited Hall *v.* Terry, 1 Atk. 502.

The Vice-Chancellor:—The testator has used words sufficient to comprehend all his legacies in the trusts of the term of five hundred

years: but I apprehend that he did not intend that the two legacies of 1000*l.* should, in any event, be paid out of his personal estate. He has directed those two legacies to be paid by his nephew, George Terry. The payment of them, was a condition annexed to the benefits which the nephew was to take under the will, and the intention of the testator was that those legacies should not be paid until his nephew came into possession of the estates, and had the means of paying them: and, consequently, the payment was postponed, on account of the circumstances of the estate, and the legacies vested on the death of the testator.

This case falls within the principle of Lowther *v.* Condon, 2 Atk. 127, and the cases of that class.

Lloyd *v.* Lord Trimlestown.

4 *Simons*, 296.

If a party claims, before the commissioners appointed under the conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government, in a character which he really sustains, and an award is made to him in that character, this court has no jurisdiction to interfere, at the suit of a party claiming to have a better title to the compensation.

March 7, 8, 9, 1831.

IN 1792, Nicholas, late Lord Trimlestown, the father of the defendant, Thomas Lord Trimlestown, was the absolute owner of both real and personal property in France, the whole of which was, either in that or the following year, seized and confiscated by the French revolutionary government. The late Lord Trimlestown, in consequence of the revolution, quitted France and went to reside in Ireland. In 1797 he married the plaintiff, Lady Trimlestown. In 1805 he made a will, by which he gave all his property in France, of whatever description, to his son, the defendant Thomas Lord Trimlestown, his heirs, executors and administrators, and made him his residuary legatee and executor. The late Lord Trimlestown made another will in 1812, and thereby, after revoking all former wills, gave all his personal estate to the plaintiff, Lady Trimlestown, and appointed John O'Shee and Henry Eustace his executors. He died in April, 1813, and his will was proved by Eustace; but the present Lord Trimlestown instituted a suit to have the probate recalled, on the ground that the will had been fraudulently obtained; and, on the trial of an issue, *divisavit vel non*, directed by the Court of Chancery in Ireland, the jury found against the will. Eustace afterwards died, and, there being no personal representative of the testator, administration of his effects *pendente lite*, was granted, by the Court of Prerogative in Ireland, to the defendant Rochfort.

In 1818, the defendant, Lord Trimlestown, having petitioned the French government, as *seul heritier* of his late father, was restored, in that character, to a small piece of land, which was the only portion of the estates in France that remained unsold: his lordship also claimed, before the commissioners appointed under the treaties and conventions made, in

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1814 and 1815, between the British and French governments,* to be compensated for the losses sustained by his late father, by the confiscation of the rest of his property, both real and personal. Lady Trimlestown (who, after the testator's death, married the plaintiff Lloyd,) having heard of the claim, a letter, dated the 3d of July, 1820, (but which was four or five years after the time limited by the convention of the 20th November, 1815, for bringing forward claims before the commissioners,) was, by her direction, written, by Mr. Mundell, her agent, to the commissioners, stating that she was entitled to the whole of the testator's personal property, under the will of 1812, and requesting that no money might be paid to the defendant Lord Trimlestown, in respect of his claim: and Mundell, at an interview which he had with Mr. Mackenzie, one of the commissioners, was told that Lord Trimlestown's claim had been rejected for the present, but that it was possible that the commissioners might reconsider it, and, if they did, that his letter should be attended to. The commissioners, however, without giving notice to Lady Trimlestown, or her agent, afterwards made an award, by which, after finding that the unsold portion of the estates had been restored, by the French government, to the defendant Lord Trimlestown, as *seul heritier* of his father, resolved that the defendant, as the recognized son and sole heir of his father, by the French government, was entitled, under the convention of the 20th of November, 1815, to certain sums, being the values of the estates that had been confiscated, and amounting, together, to 13,023 francs and 31 centimes, and to interest thereon, at four per cent, from the 9th of October, 1793 (the date of the decree of sequester of British property) up to the 22d of March, 1816, amounting, with the principal, to 247,193 francs and 20 centimes, which, calculated at the rate prescribed by the fourth article of the convention, would produce an annual rente of 16,125 francs, and which they accordingly awarded to him. The commissioners also found that the defendant Lord Trimlestown, as the son and heir of his late father, was entitled, under the same convention, to the sum therein mentioned, arising from the sale of movable property belonging to his late father, and to interest thereon during the time before-mentioned: and that the defendant, as such son and heir as aforesaid, was also entitled to another sum received by the French authorities, arising from rents, and interest due on certain moneys owing to his late father, the amount of which sums, calculated at the rate before-mentioned, would produce an annual rente of 9671 francs, which they accordingly awarded to the defendant, as such son and heir of his late father. Afterwards Lord Trimlestown received sixty-five per cent upon the sums so awarded to him, for which he had previously signed four printed receipts, which had been delivered, in blank, to his agent, by George Bain, a clerk to the commissioners, and who, upon their being returned, with Lord Trimlestown's signature, filled them up, and, by mistake, described his lordship as the executor of his late father, instead of as his heir, as he was described in the award.

The bill was filed in August, 1822, by Lloyd and Lady Trimlestown, his wife, against Lord Trimlestown, the commissioners for carrying the treaties and conventions into effect, Count D'Alton and Rosalie his wife,

* These treaties and conventions, and the Act of Parliament 59 Geo. 3. c. 31, relating to them, will be found in the reports of Hill *v.* Reardon, Jacob, 84; 2 Sim. & Stu. 431; and 2 Russ. 608.

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(who was the sister of the defendant Lord Trimlestown,) and Rockfort, the administrator *pendente lite* of the late Lord Trimlestown, claiming the sums that had been awarded as a compensation for the rents and profits and other personal property, as part of the personal estate of the late Lord Trimlestown, and alleging that, as the plaintiff, Lady Trimlestown, as the widow and residuary legatee of the late lord, would, according to the law of France, have been entitled to a large share of, or interest in the real estates, if the same had remained in his possession at his death, so she was then entitled to a similar share and interest in the money that had been awarded as a compensation for the loss of those estates: that, by the laws of France, the estates would, upon the late lord's death, have been divisible between his two children, equally, subject to his widow's interest therein, and that therefore Countess D'Alton claimed some interest in the sums awarded. The bill prayed that Lady Trimlestown's right and interest, as the widow and residuary legatee of the late Lord Trimlestown, in the sums awarded, might be ascertained, and that those sums might be secured by the court; and that Lord Trimlestown might be decreed to pay, to the plaintiffs, so much of the sums awarded which he had received, as should appear to belong to the personal estate of the late lord, and that so much of the sums as were unreceived, might be applied, under the directions of the court, according to the rights of the persons interested therein, and that the plaintiffs might be paid so much thereof as should appear to belong to them; and that the commissioners might be restrained from paying or transferring, to Lord Trimlestown, any further sum, and that he might be restrained from selling or transferring any of the sums that had been already awarded to him.

Lord Trimlestown, by his answer, represented that he had claimed, before the commissioners, to be compensated for the loss of his late father's immovable as well as movable property, as devisee and legatee of all his late father's property in France, under the will of 1805, and also, as *seul heritier* of his late father; and that, as such devisee and legatee, he had also made a claim in respect of a debt due, to his late father, from the Count Desclignac, but which claim had not been finally heard and determined. He submitted that, either under the will of 1805, which he considered as his father's last will, (the will of 1812 having been found, on the trial of the issue, not to be such last will,) or as *seul heritier* of his father, he was absolutely entitled to the sums that had been awarded to him: that he was advised that, by the laws of France subsisting at the time of the seizure and confiscation of his father's property, Countess D'Alton would not have been entitled, upon his father's death, to any share or interest in his property, but that he, the defendant, would have been entitled to the whole, as his father's *seul heritier*.

Count and Countess D'Alton submitted that the compensation-moneys should have been awarded, and should go in the same manner as the real and personal estate of the late lord would have gone, if he had been seised and possessed thereof at his death, according to the laws of France: and that the same would, according to such laws, have been divisible amongst his two children, subject to some share or interest therein to his widow; and that he had no power to affect the same by his will.

Witnesses were examined by the plaintiffs and by the defendant, Lord Trimlestown, to prove respectively the wills of 1812 and 1805; but there was no evidence as to what the French law was in any respect.

The portion of the rentes awarded to Lord Trimlestown, which had

not been transferred to him, had been sold, and the proceeds were paid into court, under orders made in the cause, in April, 1826, and March, 1827, the latter of which orders was obtained by the commissioners themselves.

Mr. Pepys and Mr. Beames, for the plaintiffs:

Lady Trimlestown is, at all events, entitled, under the will of 1812, to that part of the compensation which has been awarded in respect of the personal property. There was a will of 1805, which gave the property to Lord Trimlestown.

[The Vice-Chancellor:—The will of 1812, so far as it relates to the real estates, has been found, upon the trial of an issue, not to be the last will of the late Lord Trimlestown, and the right to administer his personal estate is still contested: how can I declare the rights of the parties until I know which will is to be established. As the case has been opened, I may decide against the plaintiffs, but I cannot decide in their favour.]

Lord Trimlestown claimed, before the commissioners, in a character that did not belong to him. He states in his answer, that he claimed as devisee and legatee under the will of 1805, and as *seul heritier* to his late father. The sums were awarded to him, by the latter description. The term, "*seul heritier*," means the person who is entitled by succession. The receipts were given, by Lord Trimlestown, as the executor of his father. We have proved the will of 1812, *per testes*. That will revoked the prior one. There can be no doubt that the court has jurisdiction in this case. Hill *v.* Reardon, Jac. 84; Hachett *v.* Pattle, Madd. & Geld. 4. Those cases are precisely in point. At all events, the court will secure the property pending the suit in the Ecclesiastical Court, Atkinson *v.* Henshaw, 2 V. & B. 85; and, when that suit is decided, it will have a right to adjudicate upon the rights of the claimants.

Mr. Knight and Mr. Girdlestone, Jun., for the defendants, Count and Countess D'Alton:

Lord Trimlestown has been guilty of a fraud, according to the acceptation in which that term was used by Lord Eldon in Hill *v.* Reardon. The fund has been paid into court in a suit to which Count and Countess D'Alton have been made defendants; and the court will not part with it, without deciding upon the rights of all parties, notwithstanding it has to decide between two defendants.

The Solicitor-General, Sir E. Sugden and Mr. B. Parry, for the defendant, Lord Trimlestown:

The court has no power to enter into a discussion between co-defendants, in a case like the present. Countess D'Alton cannot be heard, in this suit, against our claim. This is not the case of an interpleading bill. No evidence can be given, as between co-defendants. If Countess D'Alton has any right, she must establish it by a bill of her own.

The rights in dispute are the creation of the treaties and conventions, and, unless the parties can bring themselves within the terms of those treaties and conventions, they can have no claim at all. The *Droit d'Aubaine*, which was in existence at the time, prohibited foreigners from inheriting; and, therefore, not one of the parties could have claimed a shilling of the property, except under the treaties and conventions and the act of parliament. No one has any right to the property according

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to the ancient laws of France. This singular circumstance occurred in Hill *v.* Reardon: the commissioners were made defendants to the suit, and, in their answer, they said that they did not know who was entitled to the property, 2 Russ. 619; but still the court was of opinion that its jurisdiction was excluded, and the bill was dismissed. Sir John Leach, V. C., when the case was before him, stopped the argument on the merits, and desired the counsel to confine themselves to the question of jurisdiction only; and, his Honour says, in his judgment, that the title to relief was wholly derived from the conventions and Act of Parliament, and was to be obtained only through those conventions, and according to the provisions of the Act of Parliament, 2 Sim. & Stu. 438. What makes Hill *v.* Reardon so great an authority is, that Lord Eldon criticised the judgment of Sir John Leach; but his lordship finally affirmed it, notwithstanding the commissioners said that they did not know who was entitled to the property. Here the time for bringing forward claims before the commissioners had expired, several years before any claim was made by Lady Trimlestown; and, if Lord Trimlestown had not gone in, she could not have obtained a shilling of the compensation; and, consequently, she is claiming under Lord Trimlestown, at the same time that she is claiming adversely to him. The act of parliament refers only to claims that had been already made: it enlarged no rights. The 15th section of the act shows that the parties must go in and claim within the time prescribed; and that a party who has not done so cannot go before any other tribunal. Lord Trimlestown claimed in the character of son and heir to his father, and the award was made to him in that character; and it was not till after he had received several instalments of the sum awarded, that any claim was made by the present plaintiffs. If Lord Trimlestown had not filled the character in which he claimed, but had been a mere stranger to the late lord, still Lady Trimlestown would not have been entitled to any portion of the sum awarded to him. He would have got a benefit, but she would have lost nothing; for her right to the property ceased, when the time for claiming it expired. Lord Trimlestown claimed, and the adjudication was made to him, in a character which he alone filled: whether he was entitled, in that character, by the law of France, is immaterial. All other parties have lost their rights, because they did not come in in time. Lord Trimlestown was described, in the receipts, as the executor of his father, by mistake. Those receipts were signed by his lordship, in blank, and were afterwards filled up by the clerk. We trust that, after the decision in Hill *v.* Reardon, this bill will be dismissed with costs.

Mr. Pepys, in reply:

The title of Lady Trimlestown to the personal estate of the late Lord Trimlestown, is established by the will of 1812. His lordship was domiciled in Ireland, and died there; consequently, the law of Ireland regulates the distribution of his personal estate, wherever it may be. It is clear, by the award, that part of the property confiscated was personal property. It was the intention of the governments of France and England, in making these treaties and conventions, not to give to the heir what belonged to the executor, but to restore the property to the party who would have been entitled to it, if the confiscation had not taken place. It was never intended to allow the commissioners to give, capriciously, to the heir, what belonged to the executor. Lord Trimlestown admits

that he claimed, in respect of the movable property, as devisee and legatee under the will of 1805, and as *seul heritier* of his late father. "*Heritier*" means successor: it means *hæres factus*, as well as *hæres natus*. Lord Trimlestown was residuary legatee under the will of 1805; and, therefore, he filled the character of *seul heritier* under that will. It appears, too, by the conversation which Mr. Mundell had with Mr. Mackenzie, that the commissioners had before them a claim under a will: and the receipts are evidence of the ground upon which the commissioners proceeded in making their award. The introducing the word "executor," was the act of the commissioners: the clerk could not have inserted that word, as a matter of course. If Lord Trimlestown had claimed the property, as executor, under an act of parliament, this court would have fixed a trust upon him. But, in whatever character he claimed, he suppressed the will of 1812; and no title can be good, which is founded on a misrepresentation of right; but this court will declare him to be a trustee for the parties really entitled.

It was said that the plaintiff did not claim within the time limited by the conventions. If no claim had been made, and the plaintiff had claimed against the fund, she would have been too late: but a claim having been made against the fund, it is immaterial at what time she brought forward her claim. The act of parliament draws a distinction between claims against the fund, and against a portion of the fund set apart for any one of the claimants. When the contest is between the fund and the claimant, the appeal is to the Privy Council. If once the claim is allowed, then the Court of Chancery is to decide who is entitled to the sum awarded. Here the claim, as against the fund, has been established; and the question now is, whether it is good for the benefit of Lord Trimlestown, or of another party. Lord Eldon, from the beginning to the end of the case of Hill *v.* Reardon, maintained that this court has jurisdiction to decide whether the fund was affected by a trust. It is the law of the land that a person cannot hold property which he has obtained under a character that did not belong to him. The commissioners had no right to decide, as to this property, pending the dispute as to the probate. If that fact had been brought before them, they could not, under the 15th section of the act, have awarded the property to either party. The act of parliament did not mean that the award of the commissioners should be conclusive; but that, where there was any difficulty, this court should decide who was entitled. If the commissioners awarded the fund to one or other of the claimants, that does not prevent the assertion of title: for, if they awarded it to the wrong person, it cannot be supposed that he is to hold it. If the compensation had been paid to an administrator, on the supposition that the party, whose property had been confiscated, had died intestate, and it afterwards appeared that he made a will, which has been proved by the executor, could the administrator hold the property against the executor? It is no new grant: it is restitution. The right existed throughout the whole revolution, but the remedy did not exist. In Hachett *v.* Pattle, Pattle had got the award; but the Vice-Chancellor decided that, though he had got the award, he was not entitled to the benefit of it.

[The Vice-Chancellor:—As I understand the case, Pattle was a trustee on the face of the transaction: though he was the legal owner, yet Mrs. Pattle was to have the beneficial ownership.]

It is quite clear that Hachett claimed adversely, and defended the suit

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adversely. The commissioners considered him as the owner of the fund, and awarded it to him: if the award of the commissioners was final, no one else could have claimed it. In Hill *v.* Reardon, Lord Eldon says: "It strikes me, &c." Jacob 89. There the jurisdiction of the court was asserted in a case infinitely stronger than the present. There was no misrepresentation of character, but it was a clear adverse title. Here there is no adverse title. It is true that Lord Eldon refused the motion; but he did not entertain any doubt about the jurisdiction of the court to grant the injunction, if the facts of the case had justified it. Sir John Leach, when the cause came before him in 1825, dismissed the bill upon the question of jurisdiction; but that decision was clearly inconsistent with the opinion expressed, by Lord Eldon, in 1821. When the appeal from that decision was heard, Lord Eldon said: "suppose the person entitled to the movable property being dead, his executor had gotten a claim allowed, could it be contended that this court would not compel the executor to do his duty, and would not administer the fund according to the equities attaching upon it? If the French government had paid 100,000 francs to B., as entitled under the will of A., and it turned out that C. D. was the person actually entitled under that will, could it be said that the jurisdiction of this court was excluded in such a case." 2 Russ. 629. There is no difference, in principle, between the case put by Lord Eldon, and the present case. His lordship then goes on to say that, if there existed the character of trustee and *cestui que* trust, he should have no doubt of the jurisdiction, and that the conventions and act of parliament do not shut out equities. Here the character of trustee and *cestui que* trust does exist. The compensation for the personal property was obtained, by Lord Trimlestown, in a character that did not belong to him. The ground of Lord Eldon's decision in Hill *v.* Reardon was, that the claim of Devereux and Reardon was entirely adverse, and not one in respect of which they could be deemed to be affected with equities in favour of the plaintiff.

The Vice-Chancellor:—When the case was first opened, I certainly understood that Lord Trimlestown had claimed, before the commissioners, in the character of executor of his late father; and, if he had claimed in that character, whatever he took as executor, must have been held by him, not for his own personal benefit, but for the benefit of those to whom it was his duty, as executor, to hand over the clear residue of his late father's personal estate. But it is clear that Lord Trimlestown did not claim as executor of his late father: for, although there is a passage, in the answer, in which he states the substance of the will of 1805, whereby he was made executor, and a subsequent passage, in which he represents that he made his claim as devisee and legatee under the will of 1805, and as *seul heritier*, yet it appears, from the evidence in the cause, that he did not claim by virtue of the will of 1805, but that he rested his claim, solely, upon the ground of his being son and *seul heritier* of his father, in the sense in which that expression was supposed by the commissioners to bear. It is clear that the commissioners (whether rightly or wrongly) did award the compensation to him in respect of the movable property, because he sustained, in the view of the French law, as they supposed, the character of *seul heritier* of his late father; and, throughout the documents there is no allusion whatever to the claim having been made in any other form. The commissioners may have

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misunderstood the French law; but there is not a particle of evidence to show what the French law is; and therefore I am not at liberty to say that the commissioners have done wrong.

I admit that, if the claim had been made by Lord Trimlestown as executor, an equity would attach: and so, if he had been guilty of any fraud in obtaining the commissioners' award, an equity would have attached; but there is no evidence whatever that he practised any fraud. He claimed in a character which, unquestionably, belonged to him, and the commissioners gave his claim the sanction of their decision; and I cannot think that the passage in the answer, which obviously is a mistake, ought to affect the present question. Neither do I think that the receipts ought to have any weight; because the award was made prior to the signing of the receipts, and they were given in order, merely, that the commissioners might be safe in handing over, to Lord Trimlestown, the property which they had previously awarded to him; and it appears, clearly, from the evidence of Mr. Bain, that he filled up the receipts, after Lord Trimlestown had signed them; and it would be too much to hold that the act of the clerk, in filling up the receipts in the way he thought proper, shall prejudice Lord Trimlestown. If there had been any agreement, between Lord Trimlestown and the plaintiffs, that, if he succeeded in his claim, they should participate in the fruits of it, that would be a case in which an equity would arise. But this case is composed solely of the fact, that Lord Trimlestown made a claim in a character which he really sustained, and that, upon his making it appear, to the satisfaction of the commissioners, that he did sustain that character, they awarded the compensation to him. It seems to me that, in such a case, I must follow the rule laid down, by Lord Eldon, in the case of Hill *v.* Reardon, that is, that he would not enter into the question, whether the plaintiffs had or not a title in respect of which they might have claimed an award in their favour. In another part of the same judgment, that learned judge says: "In a case of trust or fraud I have not the least doubt of the jurisdiction of the court to interfere." 2 Russ. 630. 633. He by no means represents that the court will overhaul the judgment of the commissioners, and go into the question, for the purpose of determining whether, according to the law of France, they have made a right decision; and, although Lord Eldon does say that the court has a jurisdiction, I do not understand him to say that it will exercise it to such an extent. My opinion therefore is, that this is a case in which the award of the commissioners is final, so far as the jurisdiction of the court is concerned: for I think that, except in cases of trust or fraud, it was intended that the adjudication of the commissioners should be final.

The 10th section of the 59 Geo. 3. c. 31, relates to the case where there is a dispute between the claimant and the fund; and the 15th section, to the case where there are disputes between different persons claiming; and I certainly do not understand the claim made by means of Mr. Mundell's letter, as bringing this case within the meaning of the act. It is plain that the 15th section does not apply to such a case; because that section applies to a case where disputes arise between different claimants, and the commissioners are not able to decide as to the person legally entitled to receive the amount, or as to the competency of such person to give a valid receipt. But, in this case, there was no dispute as to who was entitled, or as to the party being competent to give a valid receipt. Besides, the commissioners (who are made parties to the

suit) have paid the money into court, under an order made in this suit, and not under the 15th section of the act. I think, therefore, that that section has nothing to do with this case.

Bill dismissed without costs, as against Lord Trimlestown; and with costs, to be paid by the plaintiffs, as against the other defendants. The fund in court to be paid out to Lord Trimlestown.

Williams *v.* Craddock.

4 *Simons*, 313.

A. being possessed of a leasehold house, deposited the lease with B. as a security for a debt. C. afterwards obtained a judgment against A., and sued out a *fi. fa.* The sheriff sold some of A.'s goods, but not the house, and returned the writ: whilst the writ was in the sheriff's hands, D., with A.'s consent, paid the debt due to B., and had the lease deposited with him as a security for the amount, and for other sums due to him from A.: Held, that C., having allowed the writ to be returned without requiring the sheriff to sell the house, had no priority over D.

March 22, 1831.

IN 1827, Isabella Paton was possessed, as assignee, of a leasehold house in Lambeth, and, being indebted to Thomas Gibbard, in 52*l.* 10*s.*, she deposited with him the lease, and the assignment thereof to her, with a memorandum that the deeds should be held by him as a security for the debt and interest.

The plaintiffs were co-partners as solicitors, and, having obtained a judgment against Mrs. Paton, for 1300*l.*, they issued a *fi. fa.* thereon, directed to the sheriff of Surrey, to whom it was delivered on the 13th of June, 1828. The sheriff seized and sold goods and effects of Mrs. Paton, but not the house, and paid over the proceeds, amounting to 42*l.* 6*s.* to the plaintiffs. Gibbard having sued Mrs. Paton for his debt, the defendant Gibson, at her request, consented to pay off the principal and interest due to Gibbard, upon having the lease and assignment delivered to and deposited with him, as a security for what he might pay to Gibbard, and also for other sums in which Mrs. Paton was indebted to him: and, accordingly, Mrs. Paton, on the 20th of June, 1828, signed and gave the following memorandum to Gibson. "Memorandum: I have, this day, settled and agreed an account of moneys lent and advanced by Mr. William Gibson to me, and also of money paid, by him, for me and on my account: and the amount now due and owing, by me, to him, is 400*l.*: and I have, this day, deposited, in his hands, the lease of my house in Lambeth road, in the county of Surrey, to be held as a deposit by way of security for the said sum and interest; and I agree to execute an assignment of such lease, by way of mortgage, if required so to do." On the 11th of July, 1828, Gibson paid, to Gibbard, the principal and interest due to him, and Gibbard delivered the lease and assignment to Gibson.

On the 9th of July, 1828, Mrs. Paton died intestate. The defendant,

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Margaret Craddock, took out administration to her, and entered into possession of the leasehold premises. After Mrs. Paton's death, the judgment was revived against Margaret Craddock. In November, 1828, the *fi. fa.* was returned. In December following the bill was filed, charging that the lease was bound by the effect of the judgment and the writ of execution issued against Mrs. Paton; and that the plaintiffs were entitled to have the lease sold, and the produce thereof, after satisfying the sum paid to Gibbard, applied in satisfaction of their debt; and that any deposit or agreement for a deposit of the lease, made by Mrs. Paton, after the issuing of the writ of execution, was ineffectual, as against the plaintiffs. The bill prayed that the leasehold premises might be sold, and the produce, after satisfying the sum paid to Gibbard, applied towards satisfaction of the plaintiff's debt; and that it might be declared that any deposit or agreement for a deposit of the lease, after the judgment obtained, and the writ of execution issued thereon, was void, as against the plaintiffs; and that the defendant Gibson might be decreed, upon receiving the sum paid to Gibbard, to deliver up the lease to the plaintiffs, and, if necessary, to join in the sale of the leasehold premises, and that the other personal estate of the intestate might be applied in further payment of the debt due from her to the plaintiffs.

Gibson, by his answer, admitted that he obtained possession of the lease, with a knowledge that the execution had issued, and after the sale of Mrs. Paton's goods; but he said that he supposed that the demand for which the execution had been issued, had been satisfied by the proceeds of the goods sold. He submitted that the lease was not bound by the effect of the judgment and writ of execution, or that, if the plaintiffs had thereby acquired any right, as against the leasehold premises, they might and ought to have availed themselves of the same, at law, either by such execution or otherwise, and that they were not entitled to any relief, in equity, in respect thereof.

The Solicitor-General and Mr. Wilbraham, for the plaintiffs:

At the time when the writ issued, the lease was not in the hands of Mrs. Paton, but in the hands of Gibbard. He was an equitable mortgagee; and the issuing of the writ gave the plaintiffs a right to redeem him. The lease having been deposited in the hands of a third person, the sheriff could not take the house in execution. At all events, the execution could not have been made effectual against the house; for all the documents which showed the nature of Mrs. Paton's interest, had been placed out of her power. The plaintiffs, therefore, bring themselves within the principle upon which this court gives assistance to an equitable execution.

Mr. Jacob, for the defendants:

A writ of *fi. fa.* binds from the time of its delivery to the sheriff: but it does not bind after it is returned. It then becomes *functus officio.* Part of Mrs. Paton's goods were sold; and she was left in possession of the house. The natural presumption was, that the debt was satisfied. The plaintiffs might have directed the sheriff to sell the house, if they had thought proper to do so: and, as they might have had redress at law, this court will not aid their execution.

The Vice-Chancellor:—This is a very plain case.

Gibbard had a prior equitable lien on the house at Lambeth. The

the plaintiffs recovered a judgment against Mrs. Paton, and took out a *fi. fa.* Without doubt, the writ, from the time it was lodged with the sheriff, bound the legal estate in the premises. The sheriff, however, did not take possession of the leasehold house, but seized other chattels, and afterwards returned the writ. Whilst the writ was in the sheriff's hands, Gibson took a transfer of Gibbard's lien, and became, in effect, an equitable mortgagee. If the matter had been to be considered prior to the return of the writ, the rights of the parties would have stood thus: Gibbard would have been entitled to stand as first incumbrancer; the plaintiffs as second, and then Gibson as third. The transaction, however, was such, that the plaintiffs, who had a lien on the legal lease, did not avail themselves of it, and so let in the subsequent incumbrancer. The question then is, whether the plaintiffs can come, after the return of the writ, and say that, because they are entitled to take out a second writ, they ought to be remitted to their former rights. The fact that the judgment-creditors did not sell the house, but let the sheriff return the writ, is a reason why the subsequent incumbrancer should be preferred.

In Causton *v.* Macklew, 2 Sim. 242, a person who was possessed of a term for years in a house, had allowed judgments to be entered up against him. The term having been sold, the purchaser objected to the title, on the ground that continuances might have been entered, and there might, by possibility, be writs in the hands of the sheriff. But I thought that that mere hypothesis was not sufficient, and overruled the objection. I take the decision in Causton *v.* Macklew to be right, not because I decided it, but because it has not been appealed from.

In this case, the plaintiffs, whilst the writ was in the sheriff's hands, had a lien on the house, which they wilfully abstained from exercising. The result is, that the plaintiffs may redeem Gibson, if they choose to do so; and, on their paying to him his principal, interest and costs, he must deliver to them the lease and memorandum. But if they do not choose to redeem him, the bill must be dismissed as against him.

Phelps *v.* Sproule.

4 *Simons*, 318.

A bill of revivor against new parties ought to state so much of the original bill as shows that the plaintiff is entitled to revive, otherwise it is demurrable.

A. died, having made B. his executor, who, without proving A.'s will, possessed part of his assets. B. died and made C. his executrix, who proved his will and took out administration to A. A bill was filed against C. for an account of A.'s assets possessed by her and by B. Afterwards C. died, having made D. her executor, and E. took out administration to A. Plaintiff filed a bill of revivor and supplement against D. and E., to which D. demurred, and the demurrer was allowed.

March 22; May 25, 1831.

WILLIAM PHELPS, having entered into an agreement for the purchase of an estate, died before it was completed, leaving the plaintiff his heir-at-law, and having, by his will, appointed James Sutton Olive his

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executor. J. S. Olive, without proving the will, possessed part of the personal estate of William Phelps. J. S. Olive afterwards died, having, by his will, appointed Betsy Olive his executrix; and she proved his will, and also took out letters of administration to William Phelps, with his will annexed.

The plaintiff filed a bill against Betsy Olive, claiming to have the purchase-money for the estate which William Phelps had contracted for, paid out of his personal estate, and praying for an account of his personal estate possessed by J. S. Olive, and by Betsy Olive, since J. S. Olive's death; that, if Betsy Olive did not admit assets of J. S. Olive, an account might be taken of J. S. Olive's personal estate; that the estates of William Phelps and J. S. Olive might be duly administered, and that the purchase-money might be paid, in a due course of administration, out of the personal estate of William Phelps.

After the cause had been set down for hearing, Betsy Olive died, having appointed the defendant, Anthony Sproule, her executor; and he proved her will; and, the other defendant, William Prior, took out administration to William Phelps, with his will annexed.

The plaintiff then filed a bill of revivor against Sproule and Prior, stating that, on or about the 19th of January, 1819, he had exhibited his bill of complaint against Betsy Olive, "whereby, after stating as therein stated, it was prayed, &c." The bill then set forth the prayer of the original bill, the proceedings that had taken place in the cause; the death and will of Betsy Olive; the probate thereof by Sproule; that he had become the personal representative both of Betsy Olive and J. S. Olive; and had possessed personal estate of both of them; that letters of administration, with the will of William Phelps annexed, had been granted to Prior, until certain grand-children of William Phelps should attain twenty-one; that Prior had possessed personal estate of William Phelps; that, the suit and proceedings having abated by Betsy Olive's death, the plaintiff was entitled to have them revived against Sproule and Prior, and to have the same relief against Sproule, as the personal representative of Betsy Olive and J. S. Olive, and against Prior, as the personal representative of William Phelps, as he might have had against Betsy Olive in her lifetime; that Sproule and Prior ought to admit assets of Betsy Olive and William Phelps respectively, to answer what might appear to be due to the plaintiff, from their respective estates, in respect of the plaintiff's claims set forth in the original bill, or otherwise, that Sproule might set forth an account of Betsy Olive's personal estate possessed by him, and of his application thereof, and that Prior might set forth an account of William Phelps's personal estate possessed by him, since Betsy Olive's death, and of his application thereof. The bill prayed that Sproule and Prior might answer the premises; and might show cause, if they could, why the suit and proceedings should not be revived against them, as such personal representatives as aforesaid; and that they might either admit assets of Betsy Olive and William Phelps, respectively, come to their respective hands, sufficient for the purposes aforesaid; or that Sproule might be decreed to account for Betsy Olive's personal estate received by him, and that Prior might be decreed to account for the personal estate of William Phelps received by him, since the death of Betsy Olive; and that the plaintiff might have the same relief against Sproule and Prior, as such personal representatives as aforesaid, as he might have had against Betsy Olive, in case she had not died.

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To this bill the defendant Sproule put in a demurrer, alleging that the plaintiff had not made such a case as entitled him to revive the original bill and proceedings against him.

Sir E. Sugden and Mr. Wakefield, in support of the demurrer, were stopped by the Vice-Chancellor, who observed that it was necessary for the plaintiff in a bill of revivor, to set forth so much of the stating part of the original bill as would warrant, or, at any rate, explain the prayer of the bill of revivor.

Mr. Knight and Mr. Milford, for the plaintiff, insisted that the plaintiff in a bill of revivor, was not bound to set forth any part of the original bill, except the prayer.

The Vice-Chancellor said that the plaintiff, in a bill of revivor, ought to set forth so much of the original bill, as showed that he had a title to revive the suit,* and that, the plaintiff not having done so in this case, the demurrer must be allowed. But his Honour gave the plaintiff leave to amend.

The plaintiff afterwards amended the bill of revivor, by introducing the several facts stated at the commencement of this report, and alleging that both J. S. Olive and Betsy Olive had misapplied the personal estate of William Phelps possessed by them respectively, and by praying that the suit and proceedings might be revived against Sproule only, and that the plaintiff might have the benefit of the suit, and the same relief against Sproule and Prior, as such personal representatives as aforesaid, as was prayed, by the original bill, against Betsy Olive, and might have the benefit of the original bill and the proceedings thereon, and for further relief.

The defendant, Sproule, demurred to the amended bill, alleging that the complainant had not, by his amended bill of revivor and supplement, made such a case as entitled him to revive the original bill and proceedings, against Sproule, or to any discovery from, or relief against him, as to the matters contained in the amended bill of revivor and supplement, and that any discovery which could be made, by Sproule, touching such matters, could not be of any avail, to the plaintiff, for any of the purposes for which a discovery was sought, against him, by the amended bill, nor entitle the plaintiff to revive the original bill and proceeding against him, or to any relief touching any of the matters therein complained of.

Sir E. Sugden and Mr. Wakefield, in support of the demurrer, said that Prior, being the representative of William Phelps, the original testator, was the only party whom the plaintiff was entitled to bring to account: that no collusion was charged between Sproule and Prior: that Sproule was the executor of Betsy Olive, who was administratrix to the testator; and, consequently, that he was merely a debtor to the estate of William Phelps, and was bound to account to his personal representative. Fotherby *v.* Pate, 3 Atk. 603.

Mr. Knight and Mr. Milford, in support of the bill:

The original bill was filed against Betsy Olive, who was the personal

* See Mitf. Treat. Plead. 4th edit. 76. In the case above reported, the defendants to the bill of revivor were not parties to the original bill: had they been so, perhaps, the setting forth of the prayer only of the original bill, would have been considered sufficient.

representative of the original testator. She died, and letters of administration, to the original testator, were granted to Prior. The bill of revivor and supplement alleges that both J. S. Olive and Betsy Olive possessed and misapplied the personal estate of the original testator. The bill would have been demurrable if the personal representative of the personal representative had not been a party to it. For no general account and administration of the original testator's estate can be had without having the executor of the deceased personal representative before the court.

Sir E. Sugden, in reply:

There can be no revivor against a person who is not in the chain of representation. The representation is now in Prior; the plaintiff's remedy is against the estate of the original testator. The representation ceased by the death of Betsy Olive, and Prior then became the representative of the original testator. What right has the plaintiff to follow up the remedy against the personal representative of Betsy Olive, when the right to do so is in the representative of the original testator.

The Vice-Chancellor:—The bill contains no original charge as against Anthony Sproule. But it appears that William Phelps made his will, and appointed James Sutton Olive his executor. J. S. Olive never renounced; but, without proving the will, received assets of William Phelps. J. S. Olive then died, having appointed Betsy Olive his executrix; and she also administered to the estate of William Phelps. J. S. Olive, at his death, had not the character of personal representative of William Phelps; and therefore no representation to William Phelps can be continued through him. At the time the original bill was filed, Betsy Olive was the personal representative both of William Phelps and of J. S. Olive; and, in one or other of those characters, she was answerable for the assets of William Phelps possessed by her, and also by J. S. Olive. When she died, Anthony Sproule only represented her. The right to call for an account fell upon Prior, who was administrator *de bonis non* of William Phelps. The bill contains no new, substantive charge against Anthony Sproule; and, therefore, the plaintiff has no right to file a bill of revivor and supplement against him; for there is not that continued chain of representation which can justify a bill of revivor against him.

Demurrer allowed, with liberty to the plaintiff to amend his bill.

Bradbury *v.* Booker.

4 *Simons*, 325.

THE fourth of Lord Lyndhurst's orders relates to exceptions for insufficiency only.

April 15, 1831.

Hubbard *v.* Bagshaw.

4 *Simons*, 326.

A. tenant in fee of a cotton mill in which there was a steam engine, boilers, &c., mortgaged the mill, engine, boilers, &c., to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building: Held, that the steam engine was not in the order and disposition of A. at his bankruptcy.

April 19; May 24, 1831.

BY indentures of lease and release of the 2d and 3d of January, 1815, Messrs. Sharp, cotton spinners, and co-partners, made a mortgage in fee to Messrs. Wentworth & Co., bankers and co-partners, of a dwelling-house at Birkenshaw, in Yorkshire, then in the occupation of Abraham Sharp, with the cottages, warehouses, shops, barns, and other out-buildings, and the yards and gardens to the same belonging and adjoining, and also of another building situate near to the dwelling-house, then used and occupied, by Messrs. Sharp, as a mill for the spinning and manufacturing of cotton; and also of another newly erected brick mill or building, then also used for the spinning of cotton, with the steam engine and engine-house, boilers and boiler-houses, shops, warehouses, and counting-houses to the same belonging and adjoining; and also of six acres of land to the dwelling-house and premises belonging. By indentures of lease and release, of the 10th and 11th of August, 1825, Wentworth & Co. on being paid by the plaintiffs the money due on the mortgage, joined with Messrs. Sharp in transferring it to the plaintiffs, the description of the premises being the same as in the preceding deeds. In December, 1826, Messrs. Wentworth became bankrupts, and the defendants, Dawson, Woolin, Thompson, Leak, Scawin and Hotham, were chosen their assignees. In February, 1826, Messrs. Sharp, who still remained in the occupation of the mortgaged premises, also became bankrupts, and the defendant Bagshaw was chosen their assignee.

The bill alleged that the steam engine in the cotton factory, part of the mortgaged premises, and the boiler or boilers belonging thereto, were fixtures annexed to the freehold of the premises, and were fixed into and to the earth and soil thereof, by means of brick-work and otherwise, and that, connected with such steam engine, there were also, in and about the cotton factory, divers upright and tumbling shafts and gearing, which were also fixtures to and in the freehold of the said premises: that Bagshaw, as the assignee of Messrs. Sharp, had entered into possession of the mortgaged premises, and claimed the steam engine and boilers, with the appendages, including the upright and tumbling shaft and gearing, and threatened to sell and remove the same from the premises. The bill prayed for an account of the principal and interest due, to the plaintiffs, upon their mortgage-security, and for a foreclosure, in the usual manner, and that Bagshaw might be restrained from selling or removing the steam

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engine, boilers, shafts and gearing, or any other fixtures fixed in or attached to the mortgaged premises.

An injunction having been obtained according to the prayer of the bill, the cause was heard, when it was referred, to the Master, amongst other things, to inquire and state whether the steam engine, boilers, upright and tumbling shafts, gearing, and other articles, in the pleadings mentioned, or any and which of them, were in the order and disposition of Messrs. Sharp, at the time of their bankruptcy. The Master reported that he had considered of the states of facts that had been laid before him by the plaintiffs and the defendant Bagshaw, and the evidence in support thereof, and that he was of opinion that the upright and tumbling shafts and gearing, and other articles in the pleadings mentioned, were in the order and disposition of Messrs. Sharp at the time of their bankruptcy, but that the steam engine and boilers were not then in their order and disposition. Bagshaw excepted to the report, alleging that the Master ought to have certified that the steam engine and boilers,* as well as the upright and tumbling shafts, gearing and other articles, were in the order and disposition of Messrs. Sharp at the time of their bankruptcy.

James Frost, a valuer and agent for mill property, was one of the witnesses examined for the exceptant. He deposed that the steam engine was fixed, or made steady, to a stone foundation, let into the earth with iron bolts, in the engine-house, which foundation was so constructed as that a man might go underneath the same for the purpose of unfastening the bolts, or of displacing or replacing the same, and which rendered the removal of the steam engine a matter that could be easily done, and that that part of the steam engine, called the entablature plate, which encircled the beam, was fixed to the chamber-floors of the engine-house; that such plate was usually provided by the engineer, and was made of iron, but did not constitute any part of the working apparatus of the steam engine, except so far as it was used for fixing such parts of the working apparatus as required to be made steady by means of bolts and screws; that there were no other parts of the steam engine which were actually fixed into the walls or floors of the building, except what he had before described; that the entablature plate was floored round with timber or flags, but the well or space round the beams of the engine was not floored or covered over, but provided for the working of the beam; and that the steam engine was fixed, with iron bolts, to a stone foundation, as before stated, and in no other way, but that such iron bolts might be at any time unscrewed, and the whole of the steam engine be entirely removed, with the exception of the entablature plate; that he did not consider the stone foundation to be any part of the steam engine, and that the same was not provided by the person who was employed to make and set up the steam engine. The witness then described the articles which composed the gearing of the engine, and said that he did not consider the mill gearing to be any part of the gearing belonging to the steam engine; that all the parts of the steam engine and of the gearing thereof, were attached, or connected together and with the steam engine, by bolts and screws, which could severally be unbolted and unscrewed, and detached from the other parts thereof, and removed at pleasure; that he did not consider the upright or tumbling shafts to be any part of the steam engine, but to form a part of the mill gearing, and that the whole of the mill gearing might,

* The boilers being of little value, the exception was abandoned as to them.

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in two minutes' time, be totally disconnected from the steam engine and boilers; that the steam engine and the gearing thereof (except the entablature plate,) and also the upright and tumbling shafts, could be removed from their respective places, without injury to the buildings in which the same respectively were, or to the wall or floors thereof, and without removing any brick or stone-work except the brick casing or flues round the boilers, and that the same might be removed, without such injury, by removing the bolts and screws by which the same were fixed up: that the entablature plate, (which, however, constituted no part of the working apparatus of the engine,) was the only part of the steam engine or the gearing thereof, which could not be removed without injury to the walls or floors of the building, or without removing some of the stone or brick-work of the engine house: that the nature and extent of the damage which would be done, to the brick-work or stone-work, by the removal of the entablature plate, would be to take up the floor of the chamber in the engine-house: that, according to the custom of the country in which the mills were situate, if a steam engine of the nature and description of the steam engine in question, were to be erected and brought upon the leasehold premises by a tenant, during his lease, such tenant would be entitled, at the expiration of his lease, to remove the whole or any part of the said steam engine or the gearing thereof; and that, as between an outgoing and an incoming tenant, the latter would, according to the same custom, pay for the steam engine, boilers, and the gearing thereof, and the upright and tumbling shafts, and other mill gearing and the steam pipes, according to a valuation.

David Popplewell, a millwright and engineer, and who also was examined for the exceptant, deposed that the entablature plate of the steam engine was fixed in the walls of the building in which the same was; that there were also two spring beams, made of cast iron, and upon which the beam or great lever of the steam engine rode, which were fixed to the walls of the building, and were secured or made fast to the walls by means of screw bolts; that, besides the entablature plate and spring beams, no part of the steam engine was actually fixed into the walls or floors, but that all the remaining part of the steam engine and the gearing thereof, consisting of the articles which he enumerated, were connected together by means of bolts and screws, and formed what was usually called the steam engine; that the whole of the steam engine and the gearing thereof, except the entablature plate and the spring beams, could be removed, from their respective places, without the least injury to the building, in which the same were, or to the walls and flooring thereof, and without removing any brick or stone-work, by unbolting and unscrewing the same, and by separating the parts in the way in which they were first introduced into the building, and that the whole of such articles might be so unscrewed and unbolted, and made ready for removal, in the space of two hours.

This witness's evidence relative to the custom of the country, as between landlord and tenant, and outgoing and incoming tenants, was to the same effect as Frost's.

Joseph Ogden March, an engineer, and one of the plaintiff's witnesses, deposed that the steam engine was fixed with iron bolts, to a stone foundation let into the earth, and was also fixed, to the walls of the mills, by the entablature plate, spring beam and floor joists of the engine being let into the walls of the engine-house, which engine-house formed a part of

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the mill; that the engine boilers could not be removed without injury, or removing the brick or stone-work wherein or whereto the same were affixed or attached.

Charles Lord, a millwright, and another of the plaintiff's witnesses, deposed that some parts of the engine were let into brick-work and stone forming the walls of the engine-house, and that the engine was, in other parts, fastened with iron bolts to the stone foundation of the engine-house, and also, in certain places, to the walls thereof; that the engine could not be removed from the premises without injury, or removing both the brick or stone-work to which the same was fixed or attached, and also the bolts and screws by which the engine was fastened to the foundation and walls of the engine-house; and that that building would, in many places, be weakened and damaged thereby.

Greenwood Bentley, a solicitor at Bradford, in Yorkshire, another of the plaintiff's witnesses, deposed that the steam engine and the gearing thereof, were usually considered as fixtures attached to and belonging to the freeholds of the mills and buildings wherein the same were affixed or placed, and, as such, as belonging to a mortgagee of such mills and buildings; and that mortgagees lending money on such mills or buildings, considered such steam engine and gearing to be comprized, in the mortgage, as part and parcel of the freehold of such mills and buildings, and that such steam engine and gearing were usually provided, and fixed in the walls and buildings, by the owners of such mills and buildings, and were, generally, let therewith, on lease, and that the lessor of a mill usually provided, and was usually the owner of the steam engine; that the steam engine and gearing were of great value, as fixed into the mill and premises, and that the value thereof would be greatly diminished if the same were removed.

William Nicholson, another solicitor of Bradford, deposed to the same effect.

Mr. Knight and Mr. Wigram, in support of the exception:

This is not a case between landlord and tenant. But here the bankrupts, being seised, in fee, of the lands and buildings, and being the absolute owners of all the machinery, executed a mortgage in fee, of the lands and buildings, together with the machinery; and the question is whether the chattels being suffered to remain in the possession of the bankrupts, could belong to the mortgagees. The steam engine was specifically assigned as a chattel. As between landlord and tenant, it might have been removed, and was recoverable in an action of trover. As to the upright and tumbling shafts and gearing, the Master has decided in favour of our client; but, as to the steam engine, the proposition is that it was so fixed as not to be the subject of order and disposition. The counsel for the plaintiffs will found themselves upon Horn *v.* Baker, 9 East, 215. In that case there were two descriptions of chattels, namely, stills and vats. In Stewart *v.* Lombe, 1 Brod. & Bing. 513; S. C. 4 Moore, 281; Burrough, J. makes the following observation upon Horn *v.* Baker: "The stills were set in brick-work, and let into the ground. Three of the vats were supported by, and rested upon brick-work and timber, but were not fixed to the ground; and sixteen other vats stood on horses or frames of wood, which were not let into the ground, but stood upon the floor; and the court took the distinction between goods fixed in their nature, and those which can pass from hand

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to hand; clearly holding that those which were fixed, did not pass from the bankrupt to his assignees."

It appears, by the evidence for the defendant, that, as between landlord and tenant, the steam engine was removable, and that, as between an outgoing and an incoming tenant, it would be paid for by the latter. The stone to which the engine was fixed, was raised so as to enable a person to pass under it. No part of the steam engine was fixed to the buildings. The entablature plate is no part of the engine; and a person wishing to remove the engine, had nothing to do but to unfasten the bolts and screws by which it was secured, and then the engine might be removed without injuring the buildings. The entablature plate does not assist the working of the engine. The only use of it is to fasten the engine. A block of wood would have answered the same purpose. Davis *v.* Jones, 2 Barn. & Ald. 165. The question here arises in a case in which the bankrupts, who were the original owners, have only qualified that ownership by a secret act. As between landlord and the assignee of a bankrupt tenant, the assignee would be entitled to take the engine. The evidence does not establish any general usage or custom as to landlords letting steam engines, with mills of this description, to their tenants: and, if there is any such usage as to leases, it has nothing to do with a case of sale or mortgage. In Lingard *v.* Messiter, 1 Barn. & Cres. 308, Bayley, J. says: "There are two classes of cases where property demised to the bankrupt, has been held to pass to his assignees, under the stat. 21 Jac. 1. c. 19; the first is, where the bankrupt has once been the owner, the other where he has not. The evidence required to establish reputed ownership, in each of these cases, is different. In the former case, when it is once proved that the bankrupt has been the owner, and has continued in possession till the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and, therefore, proof of those facts is *primâ facie* evidence that the bankrupt is both reputed and real owner. In the latter case, the mere possession of the things demised, may not of itself be sufficient to show that the bankrupt was the reputed owner of them; and it may then be necessary for the assignees to establish that fact by other circumstances. In this case, it was proved that the bankrupt was once the owner of the machinery, and the jury have found that it continued in his possession to the time of the act of bankruptcy. That being so, the reputed ownership must be presumed to have continued as long as the possession continued. It was proved that he had ceased to be the real owner; but he would continue to be the reputed owner until it had been made notorious to the world that he had ceased to be the real owner." In Storer *v.* Hunter, 3 Barn. & Cres. 368, the principle of distinction before alluded to was recognized. There the assignee failed in establishing a case of reputed ownership. Bryson *v.* Wylie, 1 Bos. & Pull. 83, n; Sinclair *v.* Stevenson, 2 Bing. 514; The King *v.* The Inhabitants of Otley, 1 Barn. & Adol. 161.

Mr. Duckworth, for the plaintiffs:

By the mortgage-deed, the steam engine and boilers were conveyed together with the freeholds; but the upright and tumbling shafts, and mill gearing were not so conveyed. Rufford *v.* Bishop, 5 Russ. 346, is a direct decision in my favour. There Hornblower being seised in fee of some iron-works, in Staffordshire, mortgaged them to the plaintiffs. The

property comprised in the security, was described as consisting of certain parcels of land, and the buildings, steam engines, furnaces, iron-works, and other erections thereon. Hornblower remained in possession of the mortgaged property until he became bankrupt; and a suit having been instituted, by his assignees, claiming part of the mortgaged property, as having been in his order and disposition at the time of his bankruptcy, the Master to whom it had been referred to inquire as to that matter, reported that the furnaces, boilers, steam engines, wheels, retorts, floor-plates, and, in short, all the machinery and apparatus of an iron-work, were not in his order and disposition at the time of his bankruptcy. The assignees excepted to the report; and, the exception having been argued before Sir John Leach, M. R., his Honour said: "The real question here is, whether the possession of the articles in dispute necessarily inferred that the property in those articles belonged to the trader, so that he might acquire an additional credit from the fact of such possession. The evidence before the Master established that it is the custom in the county of Stafford, where iron-works are let, that articles of this description should be furnished by, and continue to be the property of the lessor. The mere possession of the bankrupt, therefore, did not necessarily infer the property in them, so as to gain him a false credit by the fact of possession. The exception must be overruled." In cases like the present, the steam engine, almost always, belongs to the owner of the mill. It is proved that it is, in part, attached to the freehold, and that it cannot be removed without injury to the building in which it is placed. Place *v.* Fagg, 4 Mann. & Ryl. 277.

The Vice-Chancellor:*—Abraham, James and Samuel Sharp, by indentures of lease and release of the 2d and 3d of January, 1815, conveyed, in fee, to Wentworth, Chaloner and Rishworth, certain messuages and mills, with the steam engine, engine-house, boilers, shops and certain parcels of land, by way of mortgage. By indentures of lease and release of the 10th and 11th of August, 1825, Wentworth, Chaloner and Rishworth, transferred the mortgage to the plaintiffs. In February, 1826, a commission of bankruptcy issued against the Sharps. Before and at the time of making the mortgage, and thenceforth up to the time of the bankruptcy, Messrs. Sharp were in possession of the mortgaged premises, including the steam engine, boilers, upright and tumbling shafts and other articles. The Master, upon a reference, has found that the steam engine and boilers were not in the order and disposition of the bankrupts, at the time of their bankruptcy, but that the shafts and other articles were. An exception has been taken, to the report, on the ground that the Master ought to have found that the steam engine was in the order and disposition of the bankrupts. No exception is taken in respect of the finding as to the boilers.

The evidence distinctly shows that the entablature plate, spring beams and wall plates of the steam engine, were affixed to the freehold, and made part of it. The steam engine, therefore, *primâ facie*, could not be considered as falling within the meaning of the words, "goods and chattels," in the 72d section of the 6 Geo. 4. c. 16.

* Although the question in the cause was a legal one, the parties had agreed that it should not be sent to a court of law.

[Chennell *v.* Martin.—4 Sim. 340.]

The general rule is that whatever is affixed to the freehold, whether by the tenant or not, shall remain, and not be removed by the tenant, but be part of the freehold. Co. Litt. 53, a. One exception to the rule is the case where the tenant, for the purposes of trade, does, at his own expense, erect buildings or affix machinery. In that case he may remove them, during the term, or during his possession after the term. Lord Dudley *v.* Lord Ward, Amb. 113; Penton *v.* Robart, 2 East, 88. But in this case, it is to be observed that the steam engine was erected before the mortgage was made, and that Messrs. Sharp, the mortgagors, were, in point of law, merely tenants at will to the plaintiffs, the mortgagees, part of whose fee-simple estate was the steam engine. The law, therefore, regarding the right of the tenant to remove machinery put up by him, and the evidence before the Master, as to the local custom authorizing tenants to remove machinery, are not applicable to the present case. In Horn *v.* Baker, 9 East, 215, Horn and Jackson were in possession, as tenants, of a distillery-house, wherein there were stills set in brick-work and let into the ground, and vats resting on brick-work, but not fixed in the ground. Horn and Jackson became bankrupts. The stills had not been set up by them; and, in an action, by the reversioner, against the assignees, it was held that, because the stills were fixed to the freehold, they did not pass to the assignees; but that the vats did pass to the assignees, on account of the reputed ownership. That case shows that, as between the assignees in bankruptcy of the tenant, and the reversioner, the assignees could not become entitled to the steam engine; and the same point was, in effect, decided in Ryall *v.* Rowles, 1 Ves. 375: and the case of Steward *v.* Lombe, 1 Brod. & Bingh. 506, is a strong decision, though not exactly, of the same point. My opinion, therefore, is, that the exception must be overruled. The costs must follow according to the general order.

Chennell *v.* Martin.*

4 *Simons*, 340.

The plaintiffs, under the decree, carried in interrogatories, for the examination of the defendants; the Master allowed some of the interrogatories, and disallowed others; the plaintiffs, before the Master had made his certificate, moved that he might be ordered to approve of the interrogatories which he had disallowed, or to receive others for the same purpose: Motion refused, the proper course being to wait till the Master has made his certificate, and then to except to it.

March 7, 14; April 16, 1833.

THE plaintiffs carried in interrogatories, under the decree, for the examination of the defendants. The Master had allowed some of the interrogatories, and disallowed others; but had made no certificate of his having so done.

Mr. Cooke, for the plaintiffs, now moved that the Master might be

* An early report is given of this case, on account of its importance to the practice of the court.

ordered to settle and approve of the interrogatories which he had disallowed, or to receive, settle and approve of such further interrogatories, as might appear to be framed with a view to elucidate the several matters mentioned or inquired after, in and by the interrogatories which he had disallowed.

Mr. Turner, for the defendants, said that the motion was irregular, and that the plaintiffs ought to have waited till the Master had made his report disallowing the interrogatories, and, then, excepted to it. Hughes *v.* Williams, 6 Ves. 459; Purcell *v.* Macnamara, 12 Ves. 166. In Paxton *v.* Douglas, 16 Ves. 244, Lord Eldon, C., says: "The exception should be, not to the propriety of the interrogatories, but to the Master's certificate upon what he does, after the interrogatories are addressed to the witness." Jones *v.* Powell, 1 Sim. 387, is inconsistent with all the authorities. Harris *v.* De Tastet;* Strange *v.* Thomas, Seton on Decrees, 14.

Mr. Cooke, in reply:

Hughes *v.* Williams was decided without reference to Eyles *v.* Ward, Mos. 256. Stanyford *v.* Tudor, 2 Dick. 548. That case is referred to, by Lord Eldon, in Paxton *v.* Douglas, with approbation, 16 Ves. 243; Lucas *v.* Temple, 9 Ves. 299; Jones *v.* Powell. The distinction between a report and a certificate is, that a draft of the report is first delivered to the parties, next a warrant is taken out to settle it, and then it is issued by the Master, and confirmed. A certificate is demandable, by the party, *instanter;* no draft of it is delivered by the Master, nor is the Master attended on the settling of it. Therefore, objections, which are always preliminary to exceptions, can not be taken to it. It is issued to inform the court, merely, that interrogatories have been settled. It is affirmative only; the Master never certifies that he has disallowed any of the interrogatories; but, in reporting as to the sufficiency of an answer, the Master reports both in the affirmative and in the negative. The Archbishop of York *v.* Stapleton, *post*, 157.

[The Vice-Chancellor:—Is not the case cited from Mosely, inconsistent with Lord Clarendon's order. Beames's Orders, 210.]

Mr. Cooke:—The cases cited establish a course of practice contrary to Lord Clarendon's order; and, therefore, we have the authority of Lord Eldon for saying that that order is to be considered as rescinded. Boehm *v.* De Tastet, 1 Ves. & Beam. 328.

The Vice-Chancellor:—Where it has been referred to the Master to make inquiries, or to take accounts, and to examine parties upon interrogatories as he shall think fit, and the Master either settles interrogatories which are objected to, or refuses to settle any interrogatories at all, or any proposed set of interrogatories, and, in that respect, an objection is made, the question has been argued before me how that objection shall be brought before the court, whether by motion or petition, or by way of exception?

If the Master settles interrogatories, he certifies that he has allowed them, and that certificate is filed in the Report Office. If he refuses to settle any interrogatories at all, or any given set of interrogatories, he proceeds to make his report without them.

* Cited in Jones *v.* Powell.

[Chennell *v.* Martin.—4 Sim. 340.]

I am not aware of any distinction between a Master's report, and a Master's certificate. The Practical Register defines a certificate to be a matter in writing under the hands of officers of the court; and defines a report to be a Master's certificate to the court. Lord Clarendon's orders, and the order of the 29th October, 1692, directing the filing of reports, speak of certificates or reports as being the same things, and subject to the same rules. In the 9th of the new orders, the language is: "If an answer be certified sufficient, it shall be deemed to be so from the date of the report." The 16th proposition of the chancery commissioners, uses this expression: "That upon a third answer certified to be insufficient, the defendant shall be examined, upon interrogatories, to the points reported insufficient;" and, in the 19th proposition, the language is: "Unless the Master shall think fit to make his report at a future time, certifying thereby that such future time was necessary;" and the constant language of every report is: "all which I certify." In Jones *v.* Powell, 1 Sim. 387, Sir A. Hart is represented to have said that the difference between a report and a certificate, was that, with respect to the former, the court has laid it down, as an inflexible rule, that, before exceptions could be taken to it, objections must be carried in before the Master; but that there was no such rule with respect to the latter: that, if a certificate like the one in question, could be excepted to, he did not see why exceptions might not be taken also to a certificate given, by the Accountant-General, as to stock standing in his name: that the proper course was to move, on affidavit, that the certificate might be quashed. Yet the reason assigned does not seem to bear him out; for, taking Lord Clarendon's orders, and the subsequent orders relating to reports made by Masters, together, it is reasonably evident that reports and certificates made by Masters, are the same; and the second part of his illustration is inapplicable, because the general orders require exceptions to be taken to reports or certificates of Masters, but not to reports or certificates of other officers of the court; and it does not follow, because it might be right to move to quash the Accountant-General's certificate, that it is right to move to quash a Master's certificate. If Sir A. Hart had said that there was a difference between the certificate of a Master, and the certificate of any other officer of the court, I think he would have said rightly: because Masters' reports or certificates, are, by the general orders, directed to be filed, and are made not liable to appeal, unless by way of exception, in support of which objections must be previously carried in. But those orders do not apply to certificates or reports of any other officers of the court. In common parlance, however, the term report is not used with respect to the certificate of any other officer of the court than a Master. We say the certificate of the Accountant-General, the certificate of Commissioners of Partition, the certificate from the Six Clerks' Office, as in the 43d of the new orders. But, though we apply the term report to the more lengthened productions of a Master, and the term certificate to his shorter statements, it is, I think, clear that all his reports are certificates, and all his certificates are reports.

The general orders of the court must be followed, unless there has been a uniform current of practice to the contrary. In Eyles *v.* Ward, Mosely, 256, which was cited by Mr. Cooke, it seems that it was referred to the Master, to amend an enrolment; and he made a report, to which the defendants had taken exceptions; but the Master of the Rolls said those exceptions were irregular: "for the order was for him to amend,

[Chennell *v.* Martin.—4 Sim. 340.]

and he certifies that he has amended; and, though the Master's opinion cannot preclude the defendant, if he has any objection to it, he must move to discharge the report, but cannot except to it, for exceptions are to be taken only to reports that must be confirmed by the court, or to special reports, because the court is to pass judgment upon them. But this is fairly a certificate, and there is no colour to except." It is observable that, whether the certificate was long or short, it is called a report throughout, and though it might have been valid without confirmation, or be *primâ facie* taken to be right, it by no means followed that, if it were objected to, the course prescribed by the general orders, ought not to have been adopted; because, in that case, the court must pass judgment upon it. So that the reasoning of the Master of the Rolls is not satisfactory; nor does it appear what he meant by distinguishing special reports from reports that must be confirmed by the court. It is observable also, that, by an order of the 13th of January, 1697, Beames's Orders, 307, not filing, or improperly filing an affidavit, is, expressly, made cause of exception to a report.

In 1742 there occurred the case of the Archbishop of York *v.* Stapleton, which, according to the entry in Reg. Lib. A. 1742, fol. 152, was as follows: "The matter of the exceptions taken by the said archbishop and Thomas Hayter, to the report of Samuel Burroughs, Esq., one, &c. dated the 26th of October last, on settling the interrogatories exhibited before him, by the said plaintiffs, the said Archbishop and Hayter, for the examination of the defendants, Miles Stapleton and Thomas Atkinson, in pursuance of an order made the 24th June 1741, coming on, yesterday and this day, to be argued before the Lord Chancellor, and the said plaintiffs' first exception being: 'For that the said Master had, in the first of the said interrogatories exhibited before him, struck out and disallowed great part of the said interrogatories, viz. from the words, &c. to the word, &c. which he ought not to have done; upon debate of the matter, and hearing what was alleged by the counsel for the said parties, his lordship doth order that the said exception be allowed, with this direction, that, in the first part of the said interrogatory after the word (&c.), these words be omitted, ... and that after the words (&c.), these words be inserted, &c.'" In Strange *v.* Thomas at the rolls in 1747 (cited in Mr. Seton's very valuable work, p. 14,) an exception to the Master's certificate of having settled interrogatories for the examination of a party, was allowed.

Then in 1778, the case of Stanyford *v.* Tudor, 2 Dick. 548, occurred. In the registrar's book there is but a short note of the case. The word "report" is used, but not the word certificate, and nothing appears to countenance what Dickens has reported, save that the exception was overruled. It is plain, however, that Lord Thurlow knew nothing of the subject, and the reasoning of Sir Thomas Sewell is inconclusive, for how could the determining of the question whether the examination was sufficient or not, determine the question whether the interrogatories were proper or not. It seems the objection was that the interrogatories were too long. But suppose it had been that they were too short, and did not penetrate sufficiently into the case, how would Sir T. Sewell's reasoning apply? It is observable that no reference is made, by Sir T. Sewell, to the general orders, or to the case of the Archbishop of York *v.* Stapleton, or to Strange *v.* Thomas. In Price *v.* Shaw, 2 Dick. 783, in 1789, observations are made as to the course of proceeding upon certain reports, but nothing is stated that affects the present question.

[Chennell *v.* Martin.—4 Sim. 340.]

Holbecke *v.* Sylvester, 6 Ves. 417, proves nothing, but that an "exception will lie, and a petition will not, to a Master's report of costs." Though in Lucas *v.* Temple, 9 Ves. 299, Lord Eldon seems to doubt whether the decision in Holbecke *v.* Sylvester was right. But in Hughes *v.* Williams, 6 Ves. 459, (in 1801), Lord Eldon decided, expressly, that, where the Master settled interrogatories which were objected to, as containing what was improper, the matter should be before the court, by exception, and not by petition. In Purcell *v.* Macnamara, 12 Ves. 166, in 1806 the Master had reported that an examination was sufficient; and an exception was taken, generally, that it was insufficient, and the objections were that an exception would not lie at all; and, if it would, that it should be specific, and not general. Mr. Richards, as *amicus curiæ*, thought that the mode of proceeding was right; and Sir William Grant held it to be so, referring to a case of Lucas *v.* Temple, before Lord Alvanley. In Paxton *v.* Douglas, in 1809, 16 Ves. 239, the Master certified that he had allowed interrogatories, in a creditor's suit, for the examination of a creditor, who came in. He, it seems, excepted. Lord Eldon referred to Stanyford *v.* Tudor; but no reference was made to the general orders, or to the decisions in 1742 and 1747, or to the case of Hughes *v.* Williams: and Lord Eldon held, without adverting to them, that, under the circumstances of the case, the exception should not be to the propriety of the interrogatories, but to the Master's certificate upon what he does, after the interrogatories are addressed to the witness. In Paxton *v.* Douglas, the witness objected; and, if the interrogatories went too far, Lord Eldon's observation, which was the same as Sir T. Sewell's in Stanyford *v.* Tudor, might be just. But it is manifest that, if the interrogatories had not gone far enough, his observation would not be applicable; for a full answer to the interrogatories, would not, in that case, have produced the full examination desired by those who wished to have more extensive interrogatories. In the anonymous case, 3 Madd. 246, in 1818, the Master certified that an examination was impertinent; and the Vice-Chancellor, on motion, referred it back, to the Master, to review his certificate; but it does not appear that any objection was taken that the proceeding should be by exception.

It is, I think, manifest, from the statement of these cases, that there is no settled course of practice contrary to the general orders. But we have the authority of Lord Hardwicke in 1742, the Master of the Rolls in 1747, and Lord Eldon in 1801, in support of the general orders, against the authority of the Master of the Rolls in 1729, Lord Thurlow in 1778, and Lord Eldon in 1809, consequently, the balance of authority is in favour of the general orders; and, where the objection to the report does not appear upon the face of it, I am of opinion that, if a Master reports or certifies adversely, the objection to his report or certificate should be made by exception, and not by motion or petition.

The question that has been argued is more extensive than the question in the particular case, which is that the Master has not settled certain interrogatories; and the question is, whether, on motion, I ought to interfere, before the Master has made his report. It constantly happens, in matters of pedigree and matters of title, that, when the Master has made his report, an exception is taken; because either he has admitted or rejected evidence that he ought not; and it is not the course of the court, and great inconvenience would be produced if it were the course, to apply, before the report is made, for an order that the Master shall reject or admit proposed pieces of evidence. The propriety of what he has done,

is discussed on exceptions to the report. If, in this case, the Master had certified that he had settled interrogatories, my opinion is that the proper mode of objecting, would be by exceptions to his report. But, as he has not settled interrogatories, I must wait till the Master makes a report, and then, on exceptions, determine whether he has acted rightly in refusing to examine the defendants at all, or in any given manner. I shall, therefore, refuse the motion, but without costs; for the matter has been placed, by the cases and dicta which have been cited, in some obscurity.*

Chalk *v.* Thompson.

4 *Simons*, 350.

Motion to discharge a Master's certificate of the sufficiency of the defendant's examination under a decree, refused; the proper course being to except to the Master's certificate.

March 14, 1833.

THE defendants had been examined upon interrogatories, under a decree. The Master having certified the examination to be sufficient, a motion was now made, on the part of the plaintiffs, that the Master's certificate might be discharged, and that the defendants might be ordered to put in a sufficient examination to the interrogatories.

Mr. Knight, in support of the motion.

Mr. Beames and Mr. Sandys, *contrâ*, contended that the motion was founded on a mistake of the practice, which required the plaintiffs to except to the certificate. Stanyford *v.* Tudor, 2 Dick. 548; Hughes *v.* Williams, 6 Ves. 459; Purcell *v.* Macnamara, 12 Ves. 170; Paxton *v.* Douglas, 16 Ves. 244.

April 16.—The Vice-Chancellor, after giving judgment in the pre-

* The reporter is indebted to Mr. Seton for the note of the following MS. case:

Anonymous.—*Hilary*, 1779.

By decree, all parties were to be examined upon interrogatories as the Master should direct: the Master settles interrogatories for examination of defendants, and makes his report. Defendant being dissatisfied with the interrogatories, takes exceptions to the report. This is not proper, and exceptions discharged, for it is the province of the Master to settle the interrogatories, and the party to be examined cannot take exceptions, the judgment and report of the Master being decisive, and, in this case, final. But the proper mode of proceeding in order to have the opinion of the court is, for the party to put in such examination as he thinks proper, and if the Master reports it insufficient, he may take exceptions to that report, and have the opinion of the court, for here the report is not final. See Fox *v.* Mackreth, 1 Ves. jun. 69, 70; Thornton *v.* Pellatt, 11 Price, 733, note (*a*); Harris *v.* Kemble, 4 Russ. 474. 477; see Chalk *v.* Thompson, *supra*.

ceding case, refused the motion, on the ground that exceptions ought to have been taken to the certificate.

Tyler *v.* Lake.

4 *Simons*, 351.

A. devised his real estates to B. in fee, charged with 1000*l.*, which he gave, to B. in trust to be laid out for the separate use of C. his sister for her life, and after her decease, as she should, by her will, appoint, and in default of appointment, to be retained by B. B. devised the estates to trustees in trust for C. and D. as tenants in common, in fee, subject to his debts, &c.; and by a codicil he directed his personal estate to be first applied in payment of his debts, legacies, &c. After B.'s death, the trustees conveyed the estates to C. and D. as tenants in common in fee, subject to the 1000*l.*, and other incumbrances. C. and D. having agreed to make partition, one moiety of the estates was conveyed to C., in fee, subject to a term for indemnifying D. from the 1000*l.*, and the other moiety was conveyed to D. in fee. C. afterwards mortgaged her moiety in fee; and by her will, without referring to the 1000*l.*, disposed of her personal estate in general terms: Held, that the 1000*l.* was merged.

May 7, 1831.

HENRY LORD TEYNHAM, by his will dated in 1794, devised his real estates in Kent and Staffordshire, to his brother, the Honourable John Roper, in fee, charged with 1000*l.*, which he gave to his brother, upon trust to be laid out upon government or real securities, for the separate use of Catharine, the widow of Francis Henry Tyler, for her life, and, after her decease, upon trust to be paid to such person or persons as she should, by her will, appoint; and, in default of appointment, he directed that the 1000*l.* should be retained by his brother, for his own use; and that his brother should pay interest for the same, from the end of six calendar months after his decease.

The testator died in 1800, leaving his brother (who thereupon became John Lord Teynham) his heir. John Lord Teynham, by his will dated the 5th of December, 1823, after giving some legacies, gave all his real estates to Edmund Bacot and William Leese, in fee, upon trust to pay, thereout, his debts, funeral and testamentary expenses and legacies, and all incumbrances affecting those estates, and, subject thereto, in trust for Catharine Tyler and his nephew Charles Henry Tyler, equally, as tenants in common in fee; and he appointed Bacot and Leese his executors. By a codicil of even date with his will, he directed that his personal estate should be first applied in payment of his debts, funeral and testamentary expenses, and legacies, and that such part thereof as his personal estate should not be sufficient to discharge, should be paid out of his real estates. It being known that John Lord Teynham's personal estate would be insufficient to pay his debts, no disposition of the residue was contained either in the will or in the codicil.

The testator afterwards died, leaving Mrs. Tyler and Charles H. Tyler his next of kin.

[Tyler *v.* Lake.—4 Sim. 351.]

By indentures of the 4th and 5th of January, 1825, Bacot and Leese conveyed the estates, to Catharine Tyler, and Charles H. Tyler in fee, to the use of Bacot and Leese, for five hundred years, upon certain trusts for indemnifying them against all costs that they might sustain in consequence of their having executed that conveyance, and, subject to that term, to the use of Catharine Tyler and Charles Henry Tyler, as tenants in common in fee, subject to the 1000*l.*, and to the funeral and testamentary expenses, debts and legacies of John Lord Teynham.

Catharine Tyler and Charles Henry Tyler afterwards paid all the debts of John Lord Teynham which his personal estate was insufficient to pay, with the exception of his mortgage-debts and the 1000*l.*; and, having agreed to make partition of the estates, they referred it to John Lake and William Lake to divide the estates between them. Messrs. Lake having made their award, Catharine Tyler and Charles Henry Tyler, by indentures of the 9th and 10th of June, 1825, conveyed one moiety of the estates, to William Lake, for one thousand years, upon certain trusts for indemnifying Charles Henry Tyler from the 1000*l.*, and, from certain of the mortgage-debts of John Lord Teynham, and subject to that term, to Catharine Tyler in fee, and the other moiety, to John Lake, for one thousand one hundred years, upon certain trusts for indemnifying Mrs. Tyler from the rest of the mortgage-debts of John Lord Teynham, and, subject to that term, to certain uses in favour of Charles Henry Tyler and his heirs. By indentures of the 4th and 5th of July, 1825, Mrs. Tyler mortgaged part of her moiety of the estates, to James Parkinson, in fee, for securing 5800*l.* and interest.

Mrs. Tyler being seised, in fee, of the premises so allotted to her, subject to the 1000*l.*, (supposing that charge to be then subsisting, and not merged), and to the debt of 5800*l.*, and to the mortgage-debts of John Lord Teynham from which Charles Henry Tyler was indemnified as before mentioned, and also subject, as between her and the respective incumbrances, to the other mortgage-debts of John Lord Teynham from which she was indemnified by Charles Henry Tyler, as before mentioned, by indentures of the 9th and 10th of August, 1825, conveyed the premises allotted to her, subject to the several mortgages and other incumbrances then affecting the same, to John Lake and Edmund Bacot, upon trust to pay certain annuities during her life, and, subject thereto, in trust for herself for life; and the trustees were empowered to raise, by sale or mortgage of the premises, money sufficient to pay off the then subsisting incumbrances, and, they were directed, after Mrs. Tyler's decease, to sell the premises remaining undisposed of, and to pay off all such mortgages, charges and incumbrances as should be then affecting the premises, and created prior to the date of the now stating indentures, by Mrs. Tyler, or, subsequently thereto, by the trustees, and to distribute the remainder of the proceeds of the sale amongst, or for the benefit of her children, as therein directed. *Ante*, p. 74.

After the execution of this settlement, Mrs. Tyler borrowed 11,800*l.* from the Equitable Assurance Society; and, with that sum, she cleared off all the incumbrances affecting her moiety of the estates, except the 1000*l.*, and the charges against which she had been indemnified by Charles Henry Tyler; and, to secure the 11,800*l.*, she (but without the concurrence of the trustees of the settlement) mortgaged part of the settled estates to the Society.

Mrs. Tyler, by her will, dated the 10th of August, 1825, and which

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was executed by her in the presence of, and attested by two witnesses, gave, to John Lake and Edmund Bacot, all her household furniture, ready money, moneys in the funds, and in the hands of her banker, securities for money, bonds, bills, specialties, mortgages, book-debts, linen, wearing apparel, watches, lace, trinkets, jewels, and other personal ornaments, plate, books, carriages, horses, cows and live stock of every description, stable utensils, wine and liquors, and all other her property, whatsoever and wheresoever, of a personal nature, upon the trusts therein mentioned; but she made no specific appointment of the 1000*l.*: and, upon her death, letters of administration of her effects, with her will annexed, were granted to her daughter, Mary Jane Tyler.

The bill was filed by three of Mrs. Tyler's children, against John Lake, Edmund Bacot, Mary Jane Tyler, Charles Henry Tyler, and the two other children of Mrs. Tyler, William Leese, the trustees of the Equitable Assurance Society, and certain other persons: it prayed that the trusts of the settlement might be carried into execution; that, if it should appear to the court, that the 1000*l.* was merged, it might be declared accordingly; but, if the court should be of opinion that the same was still a subsisting charge, that an account might be taken of what was due in respect of such charge.

Mary Jane Tyler, by her answer, claimed to be entitled, as the personal representative of Catharine Tyler, to have the 1000*l.* raised and paid to her: and she submitted that that sum was a subsisting charge upon the hereditaments out of which it was made payable, and that the same had not been merged in the fee-simple thereof, as regarded Catharine Tyler, or her, the defendant, as the personal representative of Catharine Tyler; and that Catharine Tyler took an absolute interest in the 1000*l.*, and that it passed under the general terms in her will, and formed part of her assets. Charles Henry Tyler, by his answer, submitted that the 1000*l.* had not been merged, either as regarded Catharine Tyler and her representative, or as regarded John Lord Teynham and his representatives, but that the same was then payable to the executors of John Lord Teynham, and became immediately due, from them, to his real estates, in indemnification thereof, from the debts which had been borne by those estates; and that, in consequence of the partition, and according to the construction of the deeds of partition, the moiety of those estates which had been allotted to Catharine Tyler, was not entitled to the whole benefit of such indemnification, to the exclusion of the moiety allotted to him, the defendant; and that such indemnification was in nowise affected by the partition, and that he was entitled to share in the benefit thereof in respect of his moiety of those estates.

The defendants, Bacot and Leese, by their answer, submitted to the court, whether the 1000*l.* was still a subsisting charge, and, if it was, whether it ought to be raised and paid to Mary Jane Tyler, as the representative of Mrs. Tyler, or to them, the defendants, as the personal representatives of John Lord Teynham, and whether the same became immediately due, from them, to his real estates, in indemnification thereof from the debts borne by those estates, and whether the whole, or either, and which moiety of those estates was entitled to the benefit of such indemnification.

Sir Edward Sugden, Mr. Knight, Mr. E. Montague, Mr. S. P. White, and Mr. Carpenter, for the plaintiffs, and the trustees of the Equitable Assurance Society, and other parties in the same interest:

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We contend that the charge of 1000*l.* became merged. John Lord Teynham was seised in fee of the estates subject to the charge; and he had an absolute interest in the 1000*l.*, subject to the life-interest in Mrs. Tyler, and to the probability of her exercising the power of appointment. Henry Lord Teynham, who created the charge, anticipated that the sum never might be raised; for he directed his brother to pay interest upon it, from the expiration of six months after his death. John Lord Teynham devised the estates in such a way as to pass all the interest that he had in them; and, therefore, he devised them discharged of the 1000*l.* The 1000*l.* was part of the real estates; and a gift of 1000*l.* to be raised out of real estates, though, in form, a gift of 1000*l.* is, in fact, a gift of so much of the real estate as is of the value of 1000*l.* At all events, the parties, by dealing with the estate in the manner they have done since the death of John Lord Teynham, have prevented the 1000*l.* from being raiseable. The mortgage of the entire fee, made by Mrs. Tyler, to the Equitable Assurance Office, without referring to the charge, operated as a release of the power.

Mr. Barber and Mr. Duckworth, for Mary Jane Tyler and Charles Henry Tyler:

John Lord Teynham could not elect, in his lifetime, to take the 1000*l.* as real estate; for he died in Mrs. Tyler's lifetime. After the death of John Lord Teynham, the parties made a partition of the estates, and apportioned the debts that remained unpaid, between the two moieties of the estates. By that arrangement the 1000*l.* was to be borne by Mrs. Tyler's moiety. At that time, it was a charge to the benefit of which she was entitled, for her life, and she had a power to appoint the capital; she continued to hold her moiety subject to the charge. It was not absolute property in her; therefore, she could not convert it into realty, and it never has been so converted. The parties did not make partition of the whole estate; for there was this contingent sum of 1000*l.*, which they did not calculate would revert to the estate of John Lord Teynham. Suppose that, in default of appointment by Mrs. Tyler, the 1000*l.* had been limited over to a stranger, and that she and Charles Henry Tyler had become entitled to it as legatees of that stranger, the sum must have been raised for the benefit of Charles Henry Tyler, and of the persons entitled to Mrs. Tyler's personal estate. We submit, therefore, that the 1000*l.* is a subsisting charge.

Mr. Lee appeared for the defendant John Lake, and Mr. Stuart for the defendants, the executors of John Lord Teynham.

The Vice-Chancellor:—The rule of law is that, where a person is seised in fee of an estate, and is also entitled to a charge on it, if he does no act which will have the effect of keeping the charge on foot, it must be considered as perishing in the inheritance.

If, at the death of John Lord Teynham, the land had gone to one person, and his personal estate to another, the presumption could not have arisen. But it appears that, by the will and codicil of John Lord Teynham, Catharine Tyler and Charles Henry Tyler, became tenants in common in fee of his real estates, and of all the beneficial interest in his personal estate. After the death of John Lord Teynham, deeds were executed by which the estates were conveyed to the use of Catharine Tyler and Charles Henry Tyler, as tenants in common in fee, subject to the charge

of 1000*l.*, and to the funeral and testamentary expenses, debts and legacies of John Lord Teynham. It appears to me to have been the intention of the parties to that conveyance, that the charge should subsist for the benefit of Catharine Tyler alone, and not for the benefit of Catharine Tyler and Charles Henry Tyler. She then having become entitled to have the 1000*l.* raised for her own benefit, made a mortgage in fee to the Equitable Insurance Society. Under these circumstances it would be a fraud upon the Equitable Insurance Society, to hold that the charge subsisted; and my opinion, therefore, is, that the charge is gone, Astley *v.* Milles, 1 Sim. 298.

Anonymous.

4 *Simons*, 359.

Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify; the court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into court.

May 9, 1831.

MOTION, by plaintiff, that the defendant, an executor, might be ordered to pay, into court, a certain sum which he admitted, in his answer, to have received on account of his testator's estate. It was alleged, in opposition to the motion, that the defendant stated in his answer, that he had made payments in respect of the estate, although the amount of such payments was not specified.

The Vice-Chancellor:—Where an executor admits, in his answer, that he has received a specific sum belonging to his testator's estate, but adds that he has made payments on account of the estate, the amount whereof he does not specify, the court will allow him to verify the amount of his payments, by affidavit, and then will order him to pay the actual balance into court.

May *v.* Roper.

4 *Simons*, 360.

A married lady being entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assigning, and levying a fine of, her share, to a mortgagee: Held, that she was barred of her equity to a settlement.

June 24, 1831.

ROBERT ROPER, by his will dated the 5th of October, 1807, gave a messuage and other hereditaments, called Ivory's, to his wife, Sarah, in

fee; and he devised all his other real estates to his executor and executrix thereinafter named, in trust to sell, and out of the proceeds of the sale, and out of the produce of his personal estate, to invest 2000*l.* on good security, and to pay the interest thereof to his wife for her life, and to invest, in like manner, all the rest of the moneys to arise from the sale of his real and personal estates, until the eldest of his children by his wife should attain twenty-one, or until one of them should marry with his wife's consent; and, in the meantime, to apply the interest to arise therefrom for the maintenance and education of his children; and, when any of his children should attain twenty-one, or marry with such consent, then he directed his trustees to divide all the principal moneys into such a number of equal shares as should be equal to the number of his children who should be then living; and he gave one of such shares to be then paid to such one of his children as should then have attained twenty-one, or should marry with such consent, and the remaining shares he directed should be continued out at interest as aforesaid, during the respective minorities of the remaining survivors of his said children, and he gave the said remaining shares unto the said remaining survivors of his said children, to be paid to them as and when they should respectively attain twenty-one, or marry with consent: and, immediately after the decease of his wife, he directed his executor and executrix to call in the 2000*l.*, and to apply it in such manner and proportions as thereinbefore directed touching the residue of the said principal moneys: and he appointed his wife and William Webb executor and executrix of his will.

The testator died in July, 1808, leaving his wife, and Robert Roper his only son and heir, and four daughters, who were plaintiffs in the cause, him surviving.

Sarah Roper, the testator's widow, by her will dated the 4th of September, 1810, directed her executors to sell her messuage called Ivory's, and gave the residue of the moneys to arise by the sale thereof, and by the sale of her personal estate, after payment of her debts, funeral and testamentary expenses, to her executors, upon trust to place out the same upon government or real securities, and to apply the dividends and interest of such securities for the maintenance and education of her children during their minorities; and, when any one of them should attain twenty-one, she directed her executors to pay one-fifth part of the trust-moneys to such child.

The testatrix died on the 23d February, 1812, leaving her son Robert Roper and her four daughters (all of whom were of age and married before the bill was filed) her surviving.

By the decree made in the cause on the 11th of May, 1829, the wills of the testator and testatrix were established: and it was ordered that the sales of such parts of the testator's estates as had been sold to P. Phillips (who was one of the trustees and executors of the testatrix's will) should be set aside, and that the estates of the testator and testatrix remaining unsold should be sold in the usual manner.

By an indenture of the 15th of October, 1829, Charles May and Mary his wife, she being one of the daughters of the testator and testatrix, in order to secure the repayment of 200*l.* advanced to them by Jame Currie, mortgaged, to him, their share and interest in the moneys arisen or produced, or to arise or be produced by the sale of the real and personal estates of the testator and testatrix, under their respective wills, or under any decree or order of the court, for carrying the trusts of those wills into

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effect; and they covenanted to levy a fine *sur conuzance de droit come ceo, &c.* with proclamations, to Currie, of the share and interest thereby assigned: and a fine was levied accordingly in the 10 Geo. 4. Charles May died soon after the fine was levied. The estates were afterwards sold, and the purchase-moneys amounting to 9046*l.* having been paid into court, the plaintiffs presented a petition praying that their fifth shares of the 9046*l.* might be paid to them. Upon which Mr. Currie presented a petition praying that the amount due to him for principal, interest and costs, by virtue of the before-mentioned security, might be paid to him out of Mrs. May's share, in the first instance, and before payment to her of any part thereof.

The question on the hearing of Mr. Currie's petition was, whether Mrs. May, by joining in the fine, had barred herself of her right to a settlement, out of her share of the 9046*l.* Sir E. Sugden, for the petitioner, referred to 2 Cas. and Opin. 17.

Mr. Knight for Mrs. May.

The Vice-Chancellor:—The question raised by this petition, is whether, by levying the fine, the wife is not barred of her right in equity to a settlement. Now it seems to me that I ought to hold that the fine barred the wife of all the interest that she could derive, either from the land, or the proceeds of the sale of it.

In Goodrich *v.* Shotbolt, Prec. Ch. 333, the facts were these: the husband, on his marriage, gave a bond, to Riston, conditioned for paying 300*l.* to the wife, if she survived him, with a warrant of attorney to confess a judgment against him, as a further security for the 300*l.* Riston entered up judgment on the warrant of attorney, and died. The husband being seised of lands in fee, he and his wife, by lease and release and fine, conveyed them to a purchaser; and the wife delivered up the bond to be cancelled. Then the husband died, and the wife administered to Riston, and wished to extend the judgment. But it was held that, though the delivery up of the bond, and the lease and release would not affect the judgment; yet, by the wife's fine, all her interest in equity was barred; and she was decreed to procure satisfaction to be acknowledged on the judgment.

When the case was argued, Sir E. Sugden referred to an opinion given, by Mr. Booth, on the following case. By a voluntary settlement, a term of years was vested, by B., in a trustee, in trust to pay the rents and profits to B. for life, and, after his death, to assign the term to the wife of B. And Mr. Booth held, in 1755, that B. and his wife could, by fine, make a title to a purchaser. He thought also that the title might be made good, by the wife's consenting on a decree being made. I think that this opinion is right as to the former point, but wrong as to the latter.

I hold that the fine which was levied, by the husband and wife, in this case, has had the effect of barring all the interest that the wife could, by possibility, be entitled to, either out of the land or the proceeds of it.

Anson *v.* Lee.

4 *Simons*, 364.

A. tenant in tail, under his brother's will, with remainders over, suffers a recovery to such uses as he should appoint by deed or will, and, subject thereto to the uses of the will. He afterwards makes a mortgage of part of the estate in fee, and limits the equity of redemption to the prior uses. He then joins in a transfer of the mortgage, and reserves the equity of redemption to himself in fee: Held, that the equity of redemption did not revert to the old uses.

B claiming to be tenant in tail with remainder to C. in fee, of lands in the adverse possession of D. conveys, by lease and release, all his interest to C.: Held, that the conveyance is not within 32 Hen. 8. c. 9.

March 10, 19, 1831.

SIR WILLIAM LEE, Bart., being entitled to certain family estates, in Buckinghamshire, consisting of the manor and mansion-house of Hartwell, the manor of stone and other hereditaments, subject to certain mortgages, by indentures of lease and release of the 9th and 10th of April, 1800, appointed and conveyed all the estates, in that county or elsewhere in Great Britain, whereof or wherein he, or any person or persons in trust for him or for his use, then had or was or were seised of any estate of inheritance, subject to the incumbrances thereon, unto and to the use of William Harcourt and Scrope Bernard, in fee, in trust, by sale or mortgage, to raise a sufficient fund for the purposes after-mentioned; and, in the first place, to repair thereout, to Kinnaird, Morland, & Co., the sum of 3992*l.* 1*s.* 6*d.* then due to them, with interest as therein mentioned, and also all such sums as they should advance, to Sir William Lee, or to Harcourt and Bernard, for the purposes of the trusts thereby in them reposed, with interest, and then to pay off and redeem the debts and annuities mentioned in the schedule to the release, and then to pay over to Sir William Lee, the surplus of the moneys which should then be in their hands, and to reconvey, to him and his heirs, such of the trust estates as should remain undisposed of.

Sir William Lee, by his will dated the 7th of February, 1801, devised all his real estates whatsoever that he then had, or any others had in trust for him, unto his brother, the Rev. George Lee, in tail male, with remainder to Thomas Lee, Esq., in tail male, with remainder to the plaintiff, William Earl Harcourt, in tail male, with remainder to the plaintiff, Sir George Anson, in fee. The testator died in 1801, leaving his brother, the Rev. George Lee (who thereupon became Sir George Lee, Bart.) his heir-at-law.

By an indenture of bargain and sale, dated the 2d of November, 1801, and by a recovery suffered in Michaelmas term in the 42d Geo. 3, the estates were limited to the use of such person or persons as Sir George Lee, by deed, executed in the presence of and attested by two witnesses, or by his will signed and published in the presence of three witnesses, should appoint, and, in default thereof, to such uses, upon such trusts, and to and for such ends, intents and purposes, as were expressed in the will of Sir William Lee, concerning the hereditaments thereby devised.

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Harcourt and Bernard afterwards sold part of the trust estates, and executed conveyances thereof to their respestive purchasers. They afterwards borrowed 20,000*l.* of Robert Dent and George Keysall, and, by indentures of the 6th and 7th of April, 1803, they conveyed, and Sir George Lee appointed, all the estates remaining unsold (except a farm in the occupation of one Monk) to Dent and Keysall in fee, subject to a proviso for the reconveyance of the mortgaged premises, on repayment of the 20,000*l.* with interest, to the uses to which the same stood limited prior to the execution of those indentures.

Harcourt and Bernard having paid all the debts, and redeemed all the annuities mentioned in the schedule to the deed of the 10th of April, 1800, by indentures of the 4th and 5th of November, 1803, reconveyed the estates remaining unsold, subject to the payment of the 20,000*l.* and interest, to Sir George Lee in fee, to the use of such person or persons as Sir George Lee, by deed executed in the presence of and attested by two witnesses, or by his will, signed and published in the presence of three witnesses, should appoint; and, in default thereof, to such uses, upon such trusts, and to and for such ends, intents and purposes as were expressed by the will of Sir W. Lee.

By indentures of lease and release* of the 23d and 24th of April, 1810, after reciting the will of Sir William Lee, the bargain and sale of November, 1801, the indentures of the 6th and 7th of April, 1803, and of the 4th and 5th of November, in the same year, that Robert Dent had died in February, 1805, having appointed his brother John Dent his executor, that the 20,000*l.* still remained due to Keysall, that Keysall having occasion for that sum, Sir George Lee had requested William Danby to advance the same to him, which Danby had agreed to do upon having the repayment thereof with interest secured by a transfer of the mortgage: in consideration of the 20,000*l.* paid by Danby, to Keysall, the estates comprised in the mortgage-deed of the 7th of April, 1803, were conveyed by Keysall, and appointed by Sir George Lee, to Danby in fee; and it was provided that if Sir George Lee, his heirs, executors, administrators or assigns, should pay the 20,000*l.* with interest, to Danby, his executors, administrators or assigns, at the time therein mentioned, then Danby, his heirs or assigns should re-convey the estates unto Sir George Lee, his heirs or assigns, or unto such person or persons as he or they should for that purpose appoint; and Sir George Lee covenanted that he, his heirs, executors, administrators or assigns, would pay the 20,000*l.* and interest to Danby, his executors, administrators or assigns.

Sir George Lee being desirous of completing the purchase of a small piece of ground, containing two roods, eighteen perches, which had been contracted for, by his father, in 1798, and which was then taken possession of by him, and laid into one of the farms, part of the family estates, and had ever since been occupied by the successive tenants of that farm, at one entire rent, but of which no conveyance had been taken, owing to its having been discovered that Richard Miles, the person with whom the contract was made, was tenant for life only of it, with remainder to his daughters in fee, some of whom were then minors; by indentures of lease and release of the 19th and 20th of November, 1822, reciting the death of Richard Miles, that his daughters and their husbands had levied a fine of the piece of ground, and that Sir George Lee had contracted,

* This release was inaccurately drawn.

with the daughters and their husbands, for the purchase of the piece of ground, for 28*l.*: in consideration of that sum paid to them by Sir George Lee, they conveyed the piece of ground to Sir George Lee, in fee. Sir George Lee being also desirous of completing the purchase, and getting in the legal estate of thirty-three acres, two roods, nineteen perches of land which had been allotted to his father, in 1798, under an inclosure act, in respect of some open field-land which he had before agreed to purchase of one Ford, and had in part paid for, and which had been laid into and let with a farm belonging to the family estates, and which was expressly mentioned in the deeds of April, 1800, by indentures of the 24th and 25th of November, 1824, reciting the contract with Ford, the award of the commissioners of the inclosure act, the payment of part of the purchase-money for the allotment, and other acts done by Sir George Lee's father, as owner thereof, but that he had died, without having the allotment conveyed to him, leaving Sir William Lee his eldest son and heir, and that Sir William Lee had died, leaving Sir George Lee his only brother and heir: in consideration of the sum paid in part of the purchase-money as before mentioned, and of the remainder thereof paid by Sir George Lee, Ford conveyed the allotment (which was described as then being in the possession of Mary Monk, widow, as tenant to Sir George Lee) to Sir George Lee in fee. The deeds of 1822 and 1824 were prepared by a solicitor who was not Sir George Lee's family solicitor; and they were never executed by Sir George Lee; but were found, after his death, tied up in a paper, which appeared not to have been opened by him. He had, however, executed a deed by which a term for years in the allotment was assigned to a trustee in trust for him, his heirs and assigns, to attend the inheritance.

Thomas Lee, named in Sir William Lee's will, died a bachelor in Sir George Lee's lifetime.

Sir George Lee, by his will made, in his own hand-writing, on the 25th of September, 1827, and attested by three witnesses, but which did not refer to any of the instruments before mentioned, or profess to execute any power of appointment, bequeathed all his real and landed property, wherever situated, to the defendant, Dr. John Lee, to have and to hold forever; also the mansion-house at Hartwell, furniture and books: and he gave all his personal property not otherwise disposed of, to his executors, to pay his debts, funeral expenses and legacies, and, if it should be inadequate for those purposes, then the furniture, books, and wines in the house at Hartwell, to be sold, or such parts as might be necessary and most agreeable to the defendant to part with; and he expressed a hope that the pictures would remain, being mostly family ones.

The testator died a bachelor, on the 27th of September, 1827, leaving the defendant and two ladies, the defendant's aunts, his co-heirs *ex parte paternâ*. Sir George Lee, at the time of making his will, was not entitled to any landed property, save as hereinbefore appears.

Upon Sir George Lee's death, the defendant, Dr. Lee, entered into possession of his estates. Afterwards, by indentures of lease and release, made between the plaintiff Lord Harcourt, of the one part, and the plaintiff Sir George Anson, of the other part, reciting the before-mentioned deeds, and Sir George Lee's will, and that the defendant had entered into possession of the estates subject to the power, as the devisee or appointee thereof, under Sir George Lee's will, although the plaintiffs were not disposed to admit his right thereto, (with the exception of the mansion-

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house, during his life,) and that Lord Harcourt, having no issue, and being unwilling to enter into any litigation respecting the estates, had agreed to relinquish all his right and interest therein, if any, under the will of Sir William Lee and the indenture of bargain and sale of 1801, in favour of Sir G. Anson; Lord Harcourt conveyed the estates (subject to such estate and interest therein, if any, as the defendant might be entitled to) to Sir George Anson in fee.

The bill, after stating the will of Sir W. Lee, the bargain and sale of the 2d of November, 1801, the recovery suffered in pursuance thereof, and the will of Sir George Lee, alleged that Sir George Lee was, at the time of making his will, seised, either legally or equitably, of estates not comprised either in Sir William Lee's will, or the bargain and sale and recovery; that Sir George Lee never made any appointment of the estates comprised in the bargain and sale and recovery, except so far (if at all) as his will operated as such an appointment; that, upon his death, the plaintiff, Earl Harcourt, became equitably entitled to the estates which passed by Sir William Lee's will and by the bargain and sale and recovery, as tenant in tail, with remainder to the plaintiff, Sir George Anson, in fee: that Lord Harcourt had executed an indenture, whereby or whereunder, through a grant and assurance therein contained on his part, Sir George Anson had acquired an equitable estate in possession, in those estates: that Lord Harcourt was the heir *ex parte maternâ*, of Sir George Lee: that, if any interest in the estates comprised in the bargain and sale and recovery, had been effectually appointed to the defendant (but which the plaintiffs did not admit) such interest was nothing more than an estate, for his life, in the mansion-house at Hartwell; and that Sir George Lee, after the execution of the bargain and sale, had purchased and had conveyed to him other real estates. The bill prayed that it might be declared whether the defendant, under Sir George Lee's will, was entitled to any and what (if any) interest in the hereditaments comprised in Sir William Lee's will, and the bargain and sale and recovery, and that he might deliver up, to the plaintiffs, or one of them, the possession of the said hereditaments, except so much thereof as he might be entitled to under Sir George Lee's will, and that an account might be taken of the rents and profits of such of the estates as the plaintiffs, or one of them, were or was entitled to in manner aforesaid, which had been received by the defendant, and that the amount might be paid, by the defendant, to the plaintiffs or one of them; and that a receiver might be appointed, and the defendant be restrained from committing waste upon the estates.

The defendant, by his answer, claimed to be entitled in fee to the mansion-house and all the hereditaments to which Sir George Lee was entitled at the date of his will, under his said will, either by way of direct devise, or as an effectual execution of the power or powers which, if any, were then subsisting in Sir George Lee: he denied that Sir George Lee was, at the date of his will, entitled to any estates besides those comprised in the bargain and sale and recovery, except the legal estate in the pieces of land conveyed to him by the indentures of November, 1822, and November, 1824, which he insisted that Sir G. Lee's father was equitably seised of, and that the equitable estate thereof was comprised in the bargain and sale and recovery. He said that the indenture between Earl Harcourt and Sir George Anson, was made whilst he was in the adverse possession of the estates, and when Earl Harcourt was not

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in possession thereof; and he submitted that, under those circumstances, that indenture was contrary to law, and that the plaintiffs had no right, under it, to sue or implead him; and he claimed the same benefit of the objection as if he had demurred or pleaded to the bill.

Lord Harcourt died without issue, before the suit was heard, without having done any act to bar the entail created by the will of Sir William Lee.

Sir Edward Sugden, Mr. Knight and Mr. Kindersley, for the plaintiff, Sir G. Anson:

If the will of Sir George Lee is not an execution of the powers reserved by the releases of November, 1801, and November, 1803, then the plaintiff, Sir George Anson, is entitled to the estates, under the limitations in the will of Sir William Lee. The defendant relies on the deeds of April, 1810, in order to show that the power was altogether extinguished. Then there are the deeds of November, 1822, and 1824, the former reciting the contract for the purchase of a small piece of land, consisting of two roods and eighteen perches, to have been made with Sir George Lee; the latter, that the contract for the purchase of the lands thereby conveyed, was entered into with Sir William Lee. The defendant will endeavour to make out that both these small estates were purchased by Sir William Lee, and were comprehended in, and were subject to the same uses as the family estates; and that it was owing to the family solicitor not being employed to prepare those deeds, that these small estates were conveyed to Sir George Lee in fee. Still, however, Sir George Lee had, at his death, estates of which he was seised in fee; and it is of no importance that those estates were held together with the family estates.

The questions then to be considered are: 1st. Was there an existing power in Sir George Lee at the time when he made his will? and 2d. Was that power exercised by his will? Sir George Lee has shown the most anxious desire to keep alive the limitations in the will of Sir William Lee. In the deed of November, 1801, instead of limiting the estates, in default of appointment, to himself in fee, he limits them to the uses expressed in his brother's will; and, when he takes the reconveyance in November, 1803, he re-creates the same uses. With respect to the transfer of the mortgage made by the deeds of 1810, all that can be said is, that the former uses were not expressly kept on foot. It is a settled rule of this court that, where an estate is settled to particular uses, and the party claiming under those uses is enabled, either by the exercise of a power, or otherwise, to create a charge upon the estate, there must be an intention shown, either by express recital, or by dealing with the estate in the way of limitation, to defeat the uses further than is necessary to effect the express purpose of the instrument. Where a husband and wife make a mortgage of the wife's estate, the instrument is never allowed to operate beyond the purpose of letting in the charge, unless it appears, either by recital or by limitation formally introduced, that it was the intention of the parties that the deed should have a more extensive operation. So, if a woman, having a right of dower only, levies a fine to a mortgagee, she will not be excluded from claiming her dower subject to the mortgage, without a clear expression of intention, or such a course of limitation adopted, as would prevent the possibility of doubt as to the intention. The object of Sir George Lee in executing the deeds of 1810, was merely to secure a sum of money, which he had borrowed for the purpose of

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paying off an existing debt. Can it be supposed to have been part of the contract for the loan, that the ulterior uses to which the estates were subject, should be altered. The release of April, 1810, which is very inaccurately and unskilfully prepared, recites instruments, showing the uses to which the estates stood limited: it contains no recital of any intention to limit the estates to new uses, nor does it create any new uses, but merely reserves the equity of redemption in the usual form; and, what makes it still stronger is, that the transaction was not a new mortgage, but a tranfer only of an existing charge which rode over the old uses, from one incumbrancer to another. Sir George Lee, the original mortgagor, joined in the transfer, merely to satisfy Danby that the whole 20,000*l.* still remained due. He had an estate of inheritance in the property, and also a general power of appointment; therefore, it cannot be said that it was desirable for him to possess a larger estate than he had, and he had before shown, by three several instruments, that he did not wish to have any different interest. There is no indication of a change of intention; but the court is asked to decide, upon the blundering release of 1810, that there is a sufficient indication of intention to change the channel of limitation. The *onus* of showing that there was no change of intention, does not fall upon the plaintiff; but it is incumbent on the defendant to show that there was a change of intention, and that something more was meant than merely to make a mortgage. There is not the remotest indication of such an intention beyond the words of the proviso of redemption; and it has been decided that the mere reservation of the equity of redemption, cannot operate as a limitation of new uses.

2d. The next question is whether, considering the power as existing, Sir George Lee's will was or not an execution of that power. It will be remembered that Sir George Lee had some estates over which he had a power of appointment by deed or will, and others of which he had taken to himself a conveyance in fee. By his will he makes a general devise of all his landed property to Dr. Lee. If a party has no real estate except what is subject to the power, and he disposes of that real estate, the law considers that he intended to exercise his power. But the decisions have never gone beyond that; for it has been always held, that where a party has estates of which he is seised in fee, be they ever so small, and has other estates over which he has a power only, if he makes a general disposition of all his estates without referring to the power, those estates only shall pass of which he was seised in fee. As Sir George Lee had property that would answer the description of all his real and landed property, it is perfectly clear that nothing more could pass, by that description, than the property of which he was seised in fee. Now, supposing that it stood there, we should have a very plain case. But how much stronger is it, when, after having given that which, according to law, can pass nothing but real estate of which he was seised in fee, he adds, "also the mansion-house at Hartwell, furniture and books." It is clear then that the former disposition could not have included the mansion-house at Hartwell; and, if there were no rule upon the subject, the case would be free from doubt, because the testator has told us what he meant by the previous words, namely, that which was not subject to the power. But the counsel for the defendant will be driven to contend that the former devise passed all the estates, including the mansion-house as well as the rest of the property that was subject to the power, and then that the testator says that Dr. Lee shall also have the mansion-house. By

giving, expressly, the capital mansion-house, the testator has declared, as plainly as if he had said so in as many words, that he did not mean to include, in the first devise, any part of the settled estates.

[The Vice-Chancellor:—With respect to the first question, which appears to be the important one, suppose that, before the deed of 1810 had been executed, Sir George Lee had made a will in execution of the power, and that, by that deed, instead of transferring the mortgage to the new mortgagee, he had taken a transfer, of the legal estate, from those who had it, to himself in fee, would that have been a revocation of the will?]

There is a wide distinction between the two cases: for, in the present case, Sir George Lee, who had a general power of appointment, joined in the release of 1810, merely for the purpose of creating an incumbrance, and not for the purpose of taking the estate back to himself in fee.

The cases cited for the plaintiff, were Perkins *v.* Walker, 1 Vern. 97; Thorne *v.* Thorne, 1 Vern. 141. 182; Jackson *v.* Parker, Amb. 687; Innes *v.* Jackson, 16 Ves. 356, and 1 Bligh. 104; Ruscombe *v.* Hare, 6 Dow. P. C. 1; Reeve *v.* Hicks, 2 Sim. & Stu. 403; Bennett *v.* Aburrow, 8 Ves. 609; Jones *v.* Curry, 1 Swanst. 66; Jones *v.* Tucker, 2 Mer. 533; Napier *v.* Napier, 1 Sim. 28; Lewis *v.* Lewellyn, 1 Turn. 104; Denn *v.* Roake, 2 Bingh. 497; 5 Barn. & Cress. 720; 6 Bingh. 475, and 1 Dow. & Clark. 437.

March 19.—The Vice-Chancellor:—I have considered of this case since yesterday, when the arguments for the plaintiff were concluded; and I cannot divest my mind of the impression that the reservation of the equity of redemption, in the release of 1810, has had the effect of giving, in equity, the fee simple to Sir George Lee.

Cases like Innes *v.* Jackson, and the other case alluded to, in Dow's Reports, are not, I think, similar to the present. Because, in cases of that description, the question always has been, how far the mere limitation of the equity of redemption, which is something ultra the only purpose that is apparen on the face of the deed, namely, the creation of an incumbrance on the wife's estate, shall deprive her of her beneficial inheritance beyond the letting in of the charge. It certainly is the clear law that, if there is, on the face of the deed, an intention that the wife shall join, either for the purpose of conveying the estate or destroying her dower, or some particular charge that she might have, for the benefit of the incumbrancer who took from the husband, then the mere limitation, of the equity of redemption, to the husband, shall have the effect of defeating the wife's interest for the benefit only of the husband's incumbrancer, and shall not give a new benefit to the husband. Cases of that sort appear to me not to have the least similarity to the case now before the court. Because Sir George Lee, by the limitations in the recovery deed of 1801, did not take, to himself, the equitable fee, which he might have done, but restricted himself, and limited the estate to such uses as he should, by deed or will, appoint, and, in default of appointment, the equity was to go according to the limitations of Sir William Lee's will. It appears that the legal estate was outstanding, and dealt with in a particular way; and that, in the year 1803, there was a recognition, by two distinct conveyances, that the equity of redemption should remain bound as it was by the limitations in the recovery deed of 1801. The person who prepared the release of 1810, had, distinctly, before him, (notwithstanding the

blundering way in which that deed is drawn), those deeds which showed what had been the intention of Sir George Lee in 1801, and that there was the continuance of the same purpose in 1803. The power is fully recited, by means of which alone could there have been a safe conveyance of the estate, so as to bind Sir George Lee to the new mortgagee. Then, though the original power was recited, and though the deeds were recited which show that, in similar transactions, there was an express reservation of the very limitation which created the power exercised, by Sir George Lee, by the deed of 1810, the person who framed that deed deliberately departed from that form of limitation, and reserved the equity of redemption to Sir George Lee, his heirs and assigns.

Now I must suppose that that which is expressed in the deed, was what was intended by the parties to it, unless there is something in the character of the parties, that necessarily rebuts that presumption. Where the husband and wife are dealing with the wife's estate, there is something, in the character of the parties to the deed, which rebuts the presumption that the equity of redemption was intended to go to the husband's heirs. In this case it seems to me that the presumption is the other way; because Sir George Lee was himself taking, by means of this limitation of the equity of redemption, a more beneficial interest in his own estate than he had, for some reason or other which is not disclosed, thought proper to give himself by the deeds of 1801 and 1803. In my mind there is nothing whatever to rebut the inference which arises from the plain expressions of the deed of 1810; but there is something that tends to support the inference, that that was intended which was expressed.

Without doing any violence to any of the decided cases, (and I should be extremely unwilling to depart, in the least, from the rule established by Innes *v.* Jackson and cases of that description,) I think that I am bound to decide in this case, that the first question is, in effect, concluded by the form in which the equity of redemption was reserved by the deed of 1810.

The farm in Monk's occupation, part of the family estates, not being included in the mortgage to Dent and Keysall, nor, consequently, in the transfer made of that security, to Danby, by the deeds of 1810, the power of appointment reserved, to Sir George Lee, by the recovery deed of 1801, subsisted as to that farm; and it, therefore, became necessary for the counsel for the defendant to argue the second question, namely, whether the will of Sir George Lee was an execution of the power.

Sir Charles Wetherell, Mr Sergeant Scriven and Mr Longley, for the defendant:

The mansion-house at Hartwell, and all the land around it, was settled property. The defendant was the male representative of the family. It is plain, from Sir George Lee's will, that he intended to devise, to the defendant, the settled estates and the mansion-house, so that he might reside there as the representative of the family. The word "also," in the will, means "together with." The defendant was to have the family estates, as well as the family mansion-house, furniture, pictures, &c., to enable him to keep up the establishment at Hartwell, with the same splendour and liberality as his ancestors had done. The devise to the defendant operated both as an execution of the power and as a devise. Pole *v.* Lord Somers, 6 Ves. 309; Hunloke *v.* Gell, 1 Russ. & Mylne,

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515. It was decided, in Doe *v.* Wood, 1 Barn. &. Ald. 518, that the intention of preserving a family, has weight in the construction of a will; and a bequest of family pictures may be taken into consideration in construing a will. Davies *v.* Baily, 1 Ves. 84. Now this will was made by the testator himself, a person inexperienced in law. It would be absurd to suppose that he intended to give the mansion-house to Dr. Lee, without the parks, gardens, pleasure-grounds, &c., and that he meant to devise to him this small piece of land, consisting of thirty-three acres only. Sir George Lee knew that as the estates were settled, Sir George Anson would become entitled to the family estates. Can it then be reasonably supposed that he intended to separate the mansion-house from the estates, and to make Dr. Lee the representative of the family without the means of supporting it.

The testator however had no unsettled estates, for the thirty-three acres purchased of Ford, and the two roods thirteen perches were settled by the previous deeds. It appears, by the release of 1824, that there had been a pre-existing contract for the purchase of the thirty-three acres, and that the legal estate was conveyed to Sir George Lee, in conformity to that contract. As to the two acres eighteen perches, it was said, by the other side, that the contract was made with Sir George Lee. But it appears, by our evidence, that the contract was with Sir George Lee's father, in 1798 and that he and his successors took possession under it. The fact of Richard Miles being tenant for life only, does not make any difference in the case. The recovery-deed of 1801, clearly included this small piece of land. So that, as between Sir George Lee and those claiming under him, it was annexed to the family estates. Sir George Lee could not set up any claim to the fee-simple, as he never made any formal appointment to himself in fee. The deeds by which the legal estate was conveyed, were never executed by Sir George Lee; and, if they had been executed by him, the mere taking of the legal estate could not have the effect of altering the pre-existing interest. The taking in of the legal estate will not revoke a devise, or voluntary settlement. Ellison *v.* Ellison, 6 Ves. 656; Brookman *v.* Hales, 2 Ves. & Beam. 45.

[The Vice-Chancellor:—The question with respect to the two roods and eighteen perches, is, whether there was any estate vested in Sir George Lee, on which the limitations of the recovery-deed of 1801 could be grafted? What estate and interest had Sir George Lee in that piece of land, prior to the purchase, by him, from the daughters of Richard Miles, on which he could graft a valid limitation. The possession was lawful only against Richard Miles, the father, who was tenant for life only, and, after his death, his daughters might have recovered, in ejectment, from Sir George Lee.]

The contest here is not with Miles's daughters, but with Earl Harcourt and Sir George Anson. The conveyance of 1822 amounts to a complete adoption of the contract under which the possession was originally taken.

[The Vice-Chancellor:—The contract to be adopted, was the contract with Richard Miles, the father: the contract carried into effect, was the contract with his daughters.]

The possession was under the original contract, and never changed its character.

The conveyance executed, by Lord Harcourt to Sir George Anson, affects to be a release in fee; but, as Lord Harcourt was tenant in tail only, it would not pass more than an estate for his life. It recites that

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Dr. Lee had taken possession of the estates: that was an adverse possession; and a grant, by one person, to another, of a claim of title to an estate of which a third party is in possession, is contrary to 32 Henry 8. c. 9. The release recites that Lord Harcourt was unwilling to enter into litigation, and had proposed to give up all his interest to Sir George Anson. As soon as Sir George Anson gets the conveyance, he files a bill, not in his own name alone, but in the name of Lord Harcourt as well as his own. We submit that it is clearly within the provisions of the stat. of Hen. 8. and the doctrine laid down by Lord Redesdale and Lord Eldon in Cholmondeley *v.* Clinton, 4 Bligh. 1. The bill prays that the rents received, by the defendant, may be paid to the plaintiffs or one of them. Though Lord Harcourt is now dead, the present bill cannot be sustained. In order for the plaintiff to get a decree, he must stand *rectus in curiâ* at the time he filed his bill. Barfield *v.* Kelly, 4 Russ. 355. Lord Harcourt, at all events, would be entitled to so much of the rents as accrued between the death of Sir George Lee and the conveyance to Sir George Anson; and, therefore, Lord Harcourt's executors ought to be parties to the suit.

We submit, on the whole of this case, that the bill is wrong in its origin, and that the plaintiff can have no relief upon it; that Sir George Lee manifestly intended to give all his freehold estates to Dr. Lee, in order that he might represent the family; that there was no unsettled estate at all, the equitable interest in the pieces of land purchased of Ford and Miles being included in the recovery-deed of 1801, and consequently that the devise in the will of Sir George Lee, of all his real and landed property, will pass all his freehold property, together with the mansion-house, to Dr. Lee.

The Vice-Chancellor:—It is quite plain that the two roods and eighteen perches did constitute an estate in Sir George Lee, which passed by the general words which he has used in his will, namely: "I bequeath all my real and landed property wherever situated." The contract made by Sir George Lee's father, was with Miles the father, who was merely tenant for life of the land. Miles died some time since, leaving four daughters, three married, and one a widow. The deed recites that there was a contract made, with them, by Sir George Lee, and that they had levied a fine; and then they, with their husbands, proceed to convey the estate to him, and to declare the uses of the fine in his favour. Under these circumstances, it is impossible for me to hold that there was any effectual contract, except that with Sir George Lee, or that the piece of land in question was fettered with anything that might be considered as trust.

Then it comes to this, (I decide this point upon the supposition that the power subsisted as to some parts of the estates,) that Sir George Lee having the power over some lands, and having an estate in fee in others, does, by his will, executed according to the requisites of the power, give all his landed and real property to Dr. John Lee, also the mansion-house at Hartwell, which was part of the property that was subject to the power. Now, I apprehend that, if the question depended upon the first sentence alone, I am bound, by the clear law of land, to hold that, where a party having property of which he is seised in fee, and also property over which he has merely a power of appointment, devises in general terms, the will does not, by its general terms, execute the power.

In this case there is an additional ground for holding that the first words do not allude to the execution of the power: for, after the general devise, the testator gives the mansion-house, which he could not dispose of by virtue of his interest; and I think, most clearly, that the mere gift of the mansion-house at Hartwell, cannot be held to pass all the adjacent property. On the second point, therefore, my opinion is with the plaintiff.

With respect to the objection founded on what has taken place between Earl Harcourt and Sir George Anson, since Sir George Lee's death, it amounts to this, that Earl Harcourt claiming to be tenant in tail in possession, with remainder to Sir George Lee in fee, released his right to Sir George Anson. Now there are many things which a man may release which he cannot convey; and I do not see any reason, in this case, why Earl Harcourt should not have released such right or interest as he had in these estates; and therefore I think that that objection is unfounded.

"Declare that the indentures of lease and release, dated respectively the 23d and 24th days of April, 1810, operated to vest the equitable fee of the estates therein comprised, subject to the charges therein mentioned, in Sir George Lee; and that the same estates, and also any other estates of which he was seised in fee, passed, by the devise in his will, to the defendant, John Lee, in fee: and declare that such will does not operate as an execution of the power reserved to the said Sir George Lee, by the indenture of bargain and sale dated the 2d day of November, 1801, and the indenture of release and reconveyance, dated the 5th of November, 1803, or either of them, as to such of the estates and hereditaments comprised in the said indentures of the 2d of November, 1801, and 5th of November, 1803, as (if any) were not comprised in the said indentures of the 23d and 24th days of April, 1810. And this court doth order that it be referred to the Master in rotation, to inquire what estates and hereditaments comprised in the said indenture of bargain and sale dated the 2d day of November, 1801, and the indenture of release and reconveyance dated the 5th of November, 1803, were not comprised in the said indentures of the 23d and 24th of April, 1810, but remained, at the time of the death of Sir George Lee, subject to the powers, and to the uses limited in default of appointment, by the said indentures of the 2d of November, 1801, and 5th of November, 1803; and, in order thereto, the parties are to produce, before the Master, upon oath, all deeds, &c."

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4 *Simons*, 387.

A testator by his will expressly excluded his wife from the guardianship of his children, and directed that, if she should obtain possession of them, the provision he had made for their maintenance should cease; and he appointed his executors to be their guardians. After the testator's death, his widow, as the answer alleged, forcibly removed one of the daughters from a school at which her father had placed her in his lifetime, and took the child abroad. She then filed a bill, as next friend

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of the children, against the executors, for an account of the testator's estate. The court directed the account to be taken, but referred it to the Master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made.

May 25, 1831.

JAMES ARNOTT, by his will dated the 24th of June, 1828, directed his personal estate to be invested in the funds in the names of his executors, and that the dividends thereof, or such parts thereof as might be necessary, should be expended for the maintenance, education and clothing of his children, Emily Mary Arnott, Sarah Arnott and James Arnott; and that the surplus, if any, should be invested in like manner, for their mutual benefit; and he appointed the defendants James Bleasdale and Sarah his wife, and John Jones, executors of his will, and guardians of his children; and he directed that his executors should apply such sum or sums as might be necessary to place his children in some respectable business, and the remainder, if any, to be paid to them, in equal shares, to his daughters on their marriage or going into business, and to his son on attaining twenty-one, or entering into business. The testator, by a codicil, after reciting that the profligacy of his wife had induced him to withhold from her the guardianship of his children, and that he was apprehensive that, by artifice, force or otherwise, she might endeavour to obtain possession of them, directed that, immediately upon her obtaining possession of any or either of his children, the maintenance of such child or children should cease, and should accumulate during such time as such child or children should continue under the protection or guardianship of his wife; and that his executors should lay out such maintenance money, as would otherwise have gone towards the support of such child or children, in the funds, there to be placed to the credit of such child or children, until their or either of their attaining the age of twenty-one, or day or days of marriage; and that, in the event of the return of any such child or children to the protection or guardianship of those whom he had, in his will, appointed, such maintenance money should be continued, as directed by his will. The testator declared that he had added the codicil, because he was anxious, if possible, to prevent his children from imbibing the vicious propensities of their mother, and that his property should not be squandered in the support of vice.

The testator died in August, 1821, leaving his wife and his children named in his will, (the eldest of whom was only seven years old,) him surviving. The bill was filed, in the name of his children, by their mother, as their next friend, against the executors, praying for the usual accounts of the testator's estate, that the shares of the children might be secured for their benefit, and that allowances might be made for their maintenance.

The defendants, in their answer, said that they had taken upon themselves the execution of the will, and the guardianship of the plaintiffs; that demands had been made, upon them, by creditors of the testator, exceeding, in amount, the personal estate possessed by them; that the testator, for some time before his death, had lived separate from his wife, and ceased to have any intercourse with her, and that, after she quitted him, he placed his two daughters at a boarding school, where they both remained, until the 9th of May, 1829, when one of them was forcibly, and without the knowledge of the defendants, removed, by the mother;

that the defendants, therefore, obtained, from the Court of King's Bench, a writ of *habeas corpus*, to compel the mother to produce the child, and she having failed so to do, an attachment was issued against her, but which had not been executed by reason of the mother being, as the defendants believed, resident abroad.

Mr. Knight and Mr. W. C. Macdougall, for the plaintiffs.

Sir E. Sugden and Mr. G. Richards, for the defendants, said that the father of the infants had directed, by his will, that his children should have no communication with their mother; that she had taken away one of the daughters from the school at which she had been placed by her father; that the mother, who was the only next friend of the plaintiffs, was in contempt for not obeying the writ of *habeas corpus;* that, by the terms of the will, the provision made for a child, ceased, so long as it remained with the mother; and that, under these circumstances, the court would not allow the suit to proceed.

The Vice-Chancellor directed the usual accounts to be taken of the testator's estate, that it should be referred to the Master to inquire into the facts stated in the answer, relative to the conduct of the mother, with liberty to state special circumstances; that the Master should make a separate report, as to the matters so referred to him; and that all proceedings under the decree, should be stayed until after the report was made.

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4 *Simons*, 390.

W. G., by his will dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T. G., the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure, and raising portions for his younger children, to his first and other sons in tail male. S. F., by his will dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male: provided that if the lands devised by W. G. to T. G. in tail male, should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof; then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his lifetime; then T. G. died: Held, that as W. G.'s estates came to T. G.'s second son encumbered with the term, S. F.'s estates did not go over under the shifting clause.

June 28, 30, 1831.

WILLIAM GELLIBRAND, by his will, dated the 13th of December, 1775, devised his manor-house of Chorley Hall, and his moiety of the manor of Chorley, and all other his real estates in Chorley, Adlington, Blackrod or elsewhere in Lancashire, to the use of Thomas Hawarden,

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his eldest nephew, for life, with remainder to trustees to preserve contingent remainders; and, after the death of Thomas Hawarden, but subject to an annuity of 200*l.* in favour of any such woman as Thomas Hawarden should marry, in lieu of dower, and to the usual powers and remedies for securing and compelling payment of such annuity, to the use of the first and other sons of Thomas Hawarden successively in tail male, with divers remainders over; and the testator directed Thomas Hawarden, and the other persons who might come into possession of the estates, under the limitations of his will, to assume the surname and arms of Gellibrand only.

The testator died in 1780, and Thomas Hawarden, who took the name and arms of Gellibrand, entered into possession of the devised estates. He died in 1787; and, upon his death, Thomas Gellibrand, his eldest son, and the father of the plaintiff, entered into possession of the estates as tenant in tail male.

By indentures of lease and release, dated the 10th and 11th of August, 1801, being the settlement made in pursuance of articles entered into previously to the marriage of the plaintiff's father with Marcella his wife, and by a common recovery suffered at the summer assizes for the county of Lancaster in that year, the devised premises were limited to the use of the plaintiff's father, for life, with remainder to trustees to preserve contingent remainders, with remainder to the intent that Marcella Gellibrand should receive an annuity of 500*l.* for her life, in lieu of dower, and, subject thereto, to the use of Samuel Hawarden Fazakerly and G. Goold, for a term of five hundred years to be computed from the decease of the plaintiff's father, upon certain trusts for better securing the annuity and for raising, in case there should be three or more younger children of the marriage, 10,000*l.*, for their portions, with remainders to the first and other sons of the marrige successively in tail male, with remainder to the right heirs of the plaintiff's father; and the settlement contained the usual powers of sale and exchange.

In 1805 and several succeeding years, down to 1828, different parts of the settled estates were sold and exchanged under the power, and the estates purchased with proceeds of the sales, and the estates taken in exchange, were conveyed to the uses of the settlement. Some of the lands taken in exchange, were afterwards sold, and the proceeds laid out in the purchase of other lands, which also were conveyed to the uses of the settlement.

There was issue of the marriage, four sons and five daughters. The eldest son died unmarried, in his father's lifetime, upon which the plaintiff became the eldest son of the marriage. Thomas Gellibrand, the plaintiff's father, died in December, 1828, leaving Marcella his wife, the plaintiff his eldest son, the defendant Hawarden Thomas Gellibrand, his second son, and six younger children him surviving.

Samuel Hawarden Fazakerly, one of the trustees of the term of five hundred years created by the settlement of 1801, and who executed that deed, by his will, dated the 27th of June, 1804, devised all his real estates, to certain trustees, in fee, in trust for the second son of Thomas Gellibrand, the plaintiff's father, in tail male, with remainder in trust for his third son and every subsequently born son, successively, in tail male, with remainder in trust for his eldest or only son, in tail male, with remainder in trust for the daughters of the said Thomas Gellibrand, successively, in tail male, with remainders in trust for his sons and

daughters, in like order and succession, in tail, with remainder in trust for Thomas Gellibrand for life, and, after his death, upon certain trusts during the life of John Hawarden, and, after his decease in trust for the first and other sons of John Hawarden, in tail male, with remainders in trust for his daughters successively in tail male, with remainders in trust for his sons and daughters, in like order and succession, in tail, with remainder in trust for the testator's own right heirs. And the testator declared that if, at any time during the life of the said Thomas Gellibrand, there should be a vacancy or suspense of a person capable of taking under the trusts thereinbefore declared for the second or other younger sons, or the daughters of the said Thomas Gellibrand, then his estates should, during such vacancy or suspense, be in trust for the said Thomas Gellibrand and his assigns. And the testator further declared that every person who, by virtue of his will or any codicil thereto, should become entitled to the actual freehold of his estates, should, within one year next after, and that all the persons whom any issue female of the said Thomas Gellibrand or of the said John Hawarden should marry, should, if such issue female should at the time of her or their marriage or respective marriages be so entitled as aforesaid, within one year next after the solemnization of the said marriage or marriages respectively, and if such issue female should not be so entitled at the time of such her or their marriages respectively, but should afterwards during her or their marriage or respective marriages, become entitled as aforesaid, then within one year next after she or they should respectively so become entitled as aforesaid, take and use the surname of Fazakerly only, and quarter the arms of Fazakerly with his, her or their family arms, and that the same person and persons should, within one year after they should respectively become entitled, endeavour to obtain an act of parliament, or proper license from the crown, to authorize him, her or them to take and use such surname and arms, and, in case any such person or persons should refuse, or neglect or discontinue to take or use such surname and arms, or to take proper steps to authorize him so to do, within the said space of one year, then that the trust estate thereinbefore declared for the benefit of him, her or them so neglecting or refusing, should cease, and that his estates should immediately thereupon go to the person or persons next in remainder under the trusts thereinbefore declared, in the same manner as if the person or persons so neglecting or refusing, being tenant or tenants for life, were dead, or being tenant or tenants in tail male, or in tail, were dead without issue: and the testator declared that the cesser or determination of the estate of any person, by force of the proviso thereinbefore contained, should not operate to exclude, prevent or prejudice any of the contingent trusts thereinbefore declared for his, her or their son or sons, daughter or daughters, or any other person or persons, and that, immediately after such cesser or determination of such preceding estate, and during the suspense and contingency of such then expectant remainder, the trustees of his will should pay and apply the rents of his estates, which would have belonged to the person or persons whose estate or estates should have so ceased or determined, if such cesser or determination had not taken place, to the person or persons, for the intents and purposes, and in the manner, to, for and in which the same rents and profits would have been payable and applicable, under the trusts and provisoes of his will, in case such person or persons respectively were then actually dead, but without any exclusion of, or prejudice to the

estate, right or interest of any such issue afterwards coming into existence, but only till the time of the birth of such issue respectively. And the testator further declared that if, at any time thereafter, the person or persons for the time being entitled to the possession or to the rents of the devised premises under the trusts of his will, should be under twenty-one and unmarried, then and so often as the same should happen, the trustees should, but subject and without prejudice to the powers thereinafter contained, and the uses, trusts or estates to be created thereby, during such minority and discoverture, or respective minorities and discovertures, receive the rents of the devised premises and apply a competent part thereof for the maintenance and education of the person or persons so, for the time being, entitled as aforesaid, and invest the surplus in the names of the trustees, in the usual securities, and receive the annual produce thereof, and invest such annual produce in like securities, so that the same rents, securities and annual produce might, during such minority or discoverture, or respective minorities or discovertures, accumulate in the nature of compound interest, and, at the end of such minority or discoverture, or minorities or discovertures, or earlier, if the trustees should think proper, should convert the said rents, securities and annual produce, and the accumulations thereof, into money, and lay out the money to be produced thereby in the purchase of freehold estates of inheritance, to be situate in the county of Lancaster, or of copyhold lands convenient to be held therewith, or with the lands thereinbefore devised, and should stand seised of the lands so to be purchased, upon the trusts and subject to the powers, provisoes and declarations thereinbefore expressed with respect to the hereditaments the trusts whereof were thereinbefore declared, or such of them as should be then subsisting or capable of taking effect, or as near thereto as the nature and qualities of the estates so to be purchased, and the deaths of parties and other intervening circumstances would admit of, but the testator's will was that the rents of the lands so to be purchased should, during such minority and discoverture, and respective minorities and discovertures as aforesaid, be accumulated in like manner, and applied upon and for such trusts and purposes as were thereinbefore mentioned with respect to the fund firstly thereinbefore directed to be accumulated. "Provided always, and I do hereby declare my will and mind to be, that, in case and so often as the manors, lands, tenements and hereditaments devised by the will of William Gellibrand, late of Chorley in the said county of Lancaster, Esquire, deceased, to the said Thomas Gellibrand, for an estate in tail male, shall descend to or devolve upon any son of the said Thomas Gellibrand, or any heir male of the body or respective bodies of any such son or sons, and the person upon whom the said manors, lands, tenements and hereditaments shall so descend or devolve, shall, under the trusts hereinbefore express or contained, be tenant or tenants in tail male of the messuages, lands, tenements, rents and other hereditaments, hereinbefore by me devised, so as to be then actually in possession or entitled to the rents, issues and profits thereof, and there shall, at the same time, be any other son of the said Thomas Gellibrand, or any heir male of the body of any such other son, or any legal possibility of any such other son, then and in such case, and so often as the same shall happen, the estate or estates hereby declared to be in trust for or for the benefit of any such person or persons who shall so become entitled to the messuages, lands, tenements, rents and other hereditaments devised by the said will of the said William Gellibrand as

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aforesaid, shall absolutely cease and determine; and then and in such case, and so often as the same shall happen, the messuages, lands, tenements, rents and other hereditaments hereby devised, shall, immediately thereupon, be in trust for the person or persons who would be entitled thereto if the person upon whom the estates devised by the will of the said William Gellibrand shall so descend or devolve as aforesaid, were then actually dead and there was a failure of issue inheritable under the estate in tail male hereinbefore devised in trust for him as aforesaid, save and except nevertheless and so as that if, at the time of such descent or devolution, there shall neither be any such other son, nor any heir male of the body of such other son, the cesser or determination of the estate so directed to cease and determine, shall, during such vacancy, be suspended, and not take place." And the testator bequeathed all his personal estate, not specifically bequeathed, to the same trustees, whom he appointed executors of his will, upon trust to pay his debts, funeral and testamentary expenses and legacies, and to lay out the residue in the purchase of estates to be settled to the same uses as his devised estates; and, if his personal estate should be insufficient for the payment of such debts, expenses and legacies, the trustees were directed to apply the yearly rents and profits of the devised estates in making good the deficiency.

The testator made seven codicils: by one of them, which was dated the 12th of February, 1808, he gave a copyhold estate, to his trustees, upon the trusts declared, by his will, of his real estates: and by another codicil, which was dated the 12th of October, 1809, he devised his real estates to his trustees and their heirs, and bequeathed his personal estate to them, their executors, administrators and assigns, to the uses and upon the trusts declared, by his will, concerning the same respectively: and by his last codicil, which was dated the 18th of June 1813, and which was duly executed and attested, he directed certain estates, which he had contracted to purchase, to be paid for out of his personal estate, and such estates to be conveyed, to his trustees and their heirs, to the uses and upon the trusts declared concerning his real estates, and he directed that, as his personal estate would not be sufficient to pay the purchase-moneys, the rents of his real estates should be applied in discharging the same; and that his trustees might also borrow money on mortgage, for that purpose, or any other purpose of his will and former codicils, and that none of the persons entitled, for life or otherwise, to his said real estates, should take any part of the rents thereof, until the money borrowed for payment of such newly purchased estates, should be paid, with the interest thereon. And he gave, devised and appointed all his real estates, as well freehold as copyhold, to his trustees, to the use of them, their heirs and assigns for ever, or during all such estate as he had therein, upon the same trusts, and subject to the same powers, provisoes, conditions, restrictions, limitations and charges, as such real estates, by his said will and codicils, were subject to.

The testator Samuel H. Fazakerly died in June, 1813, leaving Thomas Gellibrand, the plaintiff's father, his cousin and heir. At that time Thomas Gellibrand had three sons, and three daughters: William Gellibrand was his eldest son, the plaintiff, then an infant of the age of five years, was his second son, and the defendant, Hawarden Thomas Gellibrand, then an infant of the age of two years, was his third son.

By a decree of the Court of Chancery for the county palatine of Lancaster, made on the 9th of September, 1813, in a cause in which the acting trustees of the will and codicils of the testator S. H. Fazakerly,

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were plaintiffs, and Thomas Gellibrand, and the plaintiff, and the defendant Hawarden Thomas Gellibrand and several other persons who were legatees or annuitants under the last-mentioned will and codicils, were defendants, the will and codicils were established, and the trusts ordered to be carried into execution, and the usual accounts were directed to be taken; and it was referred to the registrar of the court to inquire what contracts had been entered into, by the testator, for the purchase of real estates, and whether it would be necessary to sell any and what part of his real estates, and what sum ought to be allowed, for the maintenance of the plaintiff during his minority.

The registrar having made his report, the cause was heard for further directions, on the 7th of October, 1813, when it was ordered that the contracts made, by the testator, should be completed, and that certain parts of his real estates should be sold, and that the money to arise by such sale, and the testator's personal estate should be applied in payment of his debts, funeral expenses and legacies, and in completing the purchases made, by the testator, and that the rents and profits of the testator's real estate, should be applied in making up the deficiency, and that the surplus of such moneys and personal estate, if any, should be invested in the purchase of three per cents, and that, after payment of the allowance for the plaintiff's maintenance, and the annuities left by the testator's will, the surplus rents, and the dividends of the moneys to be invested as before-mentioned, should be invested in the three per cents, or on mortgage.

The plaintiff afterwards took the name and arms of Fazakerly, as directed by the will. The purchases and sales directed by the decree were completed; and the surplus rents of the estates, after keeping down the payments directed to be made thereout, were paid, into a bank at Liverpool, to the account of the trustees; and, when the bill was filed, there was a balance of 3400*l.* standing to their account.

On the 6th of May, 1829, the plaintiff attained twenty-one; and by indentures of lease and release, dated the 25th and 26th of August, 1829, and by a common recovery, suffered at the summer assizes for the county palatine of Lancaster in the same year, all the freehold estates then subject to the uses and trusts of the will and codicils of Samuel Hawarden Fazakerly, were, as the bill alleged, discharged from the estate in tail male limited to the plaintiff, and all limitations and remainders thereupon expectant or depending, and were limited to such uses as the plaintiff should by deed appoint, and, in default thereof, to the use of the plaintiff in fee.

The bill charged that, although the plaintiff had become entitled to part of the hereditaments devised by the will of William Gellibrand, the hereditaments thereby devised had not descended or devolved on him, in the manner required by, or according to the true intent and meaning of the proviso in that behalf contained in the will of Samuel Hawarden Fazakerly; and that the plaintiff became and continued, until the last-mentioned recovery was suffered, entitled as tenant in tail male in possession of the hereditaments devised by and subject to the uses and trusts of the will and codicils of the last-named testator, and was then tenant in fee-simple, in possession, of such parts thereof as were freehold. The bill prayed that the defendant Ford, who was the surviving trustee under the will of S. H. Fazakerly, might be decreed to convey, to the plaintiff, the legal estate in the hereditaments devised by, and which were

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subject to the uses and trusts of the will and codicils of the last-named testator; and that the plaintiff might be let into the possession or receipt of the rents and profits of those hereditaments, subject to the subsisting annuities thereon, and that the 3400*l.*, when the same should have been duly discharged, under the provisions of the statue passed in that behalf, from the trusts to which the same was subject, might be paid to the plaintiff, and that Ford might be decreed to pay to the plaintiff, the interest accrued, on that sum, since the 6th of May, 1829, and the rents of the hereditaments accrued since the same day, after keeping down the subsisting annuities.

The defendant Hawarden Thomas Gellibrand, by his answer, denied that the recovery suffered in 1829 had had the effect stated in the bill: he insisted that, under the shifting clause in the will of Samuel H. Fazakerly, he had become entitled, as tenant in tail male, to the estates devised by that testator; and, in support of such claim, he said that Thomas Gellibrand died during the plaintiff's minority, and before the last-mentioned recovery was suffered, and that, upon his death, the hereditaments devised by William Gellibrand, did, according to the true intent and meaning of the shifting clause, descend to or devolve upon the plaintiff, who was, at that time, tenant in tail male of the hereditaments devised by S. H. Fazakerly; and he insisted that the event upon which the plaintiff's estate tail in the Fazakerly estates, was directed to cease and determine, had taken place, and that, immediately on Thomas Gellibrand's decease, those estates become vested in him, the defendant, as tenant in tail male; and that the recovery of 1829 was utterly void. He added that S. H. Fazakerly was thoroughly acquainted with the contents and effect of the indentures of lease and release and recovery of 1801, at the time of the date thereof and thenceforward to the time of his own death, and that it was always his intention that his own estates, and the estates mentioned in those indentures, should not remain united in any son of Thomas Gellibrand, but that, upon the latter estates descending upon or becoming vested in the second or any younger son of Thomas Gellibrand, his own estates should go over to the third or still younger son, as the case might be.

Sir E. Sugden and Mr. Walker, for the plaintiff:

It cannot be disputed that, upon the decease of S. H. Fazakerly, the plaintiff became entitled to a vested estate tail, in the estates devised by that testator, subject to the clause for accumulating the rents: for, at that testator's decease, the plaintiff answered the description of the second son of Thomas Gellibrand. He has since attained twenty-one, and suffered a recovery of those estates; and the question is, whether, before the recovery was suffered, the shifting clause took effect? We contend that, under the circumstances which have happened, the shifting clause has never came into operation.

The general rule applicable to all clauses, the object of which is to defeat an estate vested in a person, is to put upon them a strict construction. The court must undoubtedly construe them according to the intention of the maker of the instrument, but it can supply nothing.

We contend, firstly, that the Gellibrand estate has not descended upon the plaintiff, in point of estate and interest, in the way in which it was contemplated and provided for by this shifting clause: secondly, that it has not descended upon the plaintiff in such a way as will give effect and operation to the clause; and thirdly, however the court may dispose of

those two questions, that the estate which is required, by the clause, to descend upon the plaintiff, never has, and, in the events that have happened, never can come to him.

First: the Gellibrand estate has not come to the plaintiff, in point of estate and interest, in the way required by the clause; for, having regard to the terms of the clause, the court will see that the estate and interest in the Gellibrand estate, which was to devolve upon the plaintiff, was an estate in tail male created by the will of William Gellibrand, or, at all events, an estate equally large and beneficial as that estate. It must be admitted that, in the first part of the clause, the testator has not required that the estate shall descend under the limitations of the will. But, when we look at the second part of the clause, it cannot be doubted that he contemplated a devolution under the will of William Gellibrand; for he says: "In case the manors, &c., devised by the will of William Gellibrand, for an estate in tail male, shall descend to or devolve upon any son of the said Thomas Gellibrand, or any heir male of the body or respective bodies of any such son or sons, and the person upon whom the said manors, &c. shall so descend or devolve, shall under the trusts hereinbefore expressed or contained, be tenant or tenants in tail male of the messuages, &c., hereinbefore by me devised." Those words import that the estate is to come, in a course of devolution, as an estate tail, to the person who answers the description of heir male. The testator, therefore, has used words to which full effect cannot be given, unless the court holds that he contemplated a descent or devolution under the estate tail. Moreover, no estate can be said to have descended or devolved upon the plaintiff; because, at the death of this testator, he was entitled to a vested estate in tail male. Descent or devolution implies that the party has not, at the time, any estate in the land; whereas, the plaintiff had, at that time, under the settlement of 1801, which barred the limitations under the will, a vested estate in tail male, which, in its natural order, came into his possession, by the failure of the preceding limitations; but there was no descent or devolution, of the estate, to or upon him. There is great improbability that this testator contemplated a descent or devolution under the settlement. He made no reference to it; and his words import a devolution under the will of William Gellibrand.

But, independently of these circumstances, it is requisite that the Gellibrand estate should descend to, or devolve upon a person who was actually in possession, or entitled to the rents and profits of the Fazakerly estate; but, under the circumstances that have happened, the Gellibrand estate did not devolve upon a person entitled to the rents and profits of the Fazakerly estate; for, at the time when it devolved upon the plaintiff, he was an infant, and entitled only to a bare maintenance out of the rents and profits of the Fazakerly estate, and the surplus of those rents and profits was subject to the trust for accumulation. By the accumulation clause, the testator abrogated the effect of the previous devise, and deprived the party entitled in possession, of the rents and profits; and he never might have become entitled to the rents and profits, as he might have died under twenty-one.

The testator has declared that it is the identical estate devised by the will of William Gellibrand, that is to descend or devolve; and, if any other estate descends or devolves, the court would be making, and not construing a will, if it were to hold that the shifting clause has taken

effect. The court must intend that the testator meant the whole estate to descend or devolve; otherwise, if only one acre of the estate were to descend or devolve, the other estate would go over, which never could be the meaning of the testator. Now, by the settlement of 1801, a term of years was interposed, for securing the jointure of 500*l.* a year, and for raising portions to the amount of 10,000*l.* Then there was a power of sale and exchange created, which enabled the trustees to do what they have done, namely, to turn a great part of the estate into money, and to substitute estates purchased with part of it, for those that were in settlement, and, not only that, but to sell some of the newly purchased estates, and to purchase others in lieu of them. We shall look, in vain, into this will, to find any direction which will accommodate the shifting clause, to the case that has occurred. Suppose that the trustees had sold all the estates comprised in the settlement, and had wasted the money, there would, it is true, have been a remedy against them; but they might have been insolvent, and no beneficial relief would have been obtained. Suppose, too, that William Gellibrand, the son, had attained twenty-one, and suffered a recovery of the Gellibrand estates, and had settled them, but subject to very heavy charges, according to the original course of limitation; if the court holds that a devolution or descent from any source, is sufficient to answer the exigency of this proviso, it would, in that case, be obliged to decide that the Fazakerly estates had gone over, although an estate of little or no value had descended upon the plaintiff. It is perfectly clear that the testator never could intend to give over his estate, as being in possession, unless the Gellibrand estate itself came into possession. The alteration of the estate tail in the Gellibrand estate, itself destroyed the proviso; and, if it had not done so, the new line of limitation that put it in a different channel, made it subject to new incumbrances, and kept the parties out of possession till those incumbrances were discharged, and the power of sale and exchange, which enabled the trustees to change the estate altogether, and to turn that which was land into money, all or any of these circumstances would prevent the operation of those words which require the estate to come, to the plaintiff, in a mass, and precisely as it would have done if the limitations of the will of William Gellibrand had not been destroyed. Driver *v.* Frank, 3 Maul. & Sel. 25; S. C. 8 Taunt. 468, and 6 Pri. 41; Doe *v.* Perratt, 5 Barn. & Cress. 48.

Mr. Pepys and Mr. Duckworth, for the defendant, Hawarden Thomas Gellibrand:

The question is, whether the event has happened, which the testator intended should operate to shift his estate, from one object of his bounty to another. The cases cited have no application; for, in those cases, there was no shifting of estate at all: but the question merely was whether the party could take under a description which he did not exactly answer. The question there was, whether the party was properly described. The question here is, whether the event is properly described. The court has never been informed that Mr. Fazakerly was a trustee of the term of five hundred years; and yet it has been assumed that he thought that the limitations under the will of William Gellibrand, were still in existence; whereas it is clear that he must have known that the Gellibrand estate had been resettled, and what would become of that estate under that resettlement. In his will he introduces words applicable to the Gelli-

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brand estate, not as an estate coming by inheritance only, but by purchase. The settlement was dated in 1801; Mr. Fazakerly's will was dated in 1804. He afterwards made several codicils, the last of which was dated in January, 1813, and by which his will was republished. In the very commencement of his will, he proves, beyond all question, that he never intended the two estates to unite. Knowing that the eldest son would take the settled estates, he commences with giving his estates to the second son, in tail male, and then to the third son. Then follow the provisoes. The maintenance clause immediately precedes the shifting clause, and, in both of them, the very same, identical, expression is to be found: "And I do hereby declare my will and mind to be, that if, at any time hereafter, the person or persons for the time being entitled to the possession, or to the rents, issues and profits of the messuages, &c. hereinbefore mentioned, to be hereby devised, &c." That is merely a provident direction, during the minority of the individual entitled to the estates, as to the mode in which his own rents and profits shall be applied for his benefit. The individual, during his minority, is to be considered as the party in possession: nobody but himself is to be entitled to the beneficial interest, and the accumulations are to be made for his benefit. Then follows the shifting clause, in which we find the following expressions: "And the person upon whom the said manors, &c. shall so descend or devolve, shall, under the trusts hereinbefore expressed, be tenant or tenants in tail male of the messuages, &c. hereinbefore by me devised, so as to be then actually in possession or entitled to the rents, issues and profits thereof." Now, the possession of the settled estates having become vested in the second son of Thomas Gellibrand, has not that event taken place which the testator contemplated? He has used the word "devolve" as well as "descend," and, therefore, must have intended, by the former word, something different from descent. The word "descent" was not without its meaning, for the estate might descend from the second son to his eldest son. It might too come in some other way. It would not descend, from Thomas Gellibrand, under the settlement, for he had an estate for life only; but, upon his death, it would devolve upon the next person to take, that is, upon the second son. The word "devolve" is more comprehensive than "descend," and means "come to," by any means whatsoever.

It was said that the estate that has come to the plaintiff, is not within the meaning of the shifting clause. The question is, what did the testator mean by saying, "so as to be then actually in possession, or entitled to the rents, issues and profits thereof?" He uses the same expression in the preceding clause, in which it clearly appears that he considered the infant to be in possession of the estates; and the same words occurring in the subsequent clause, must receive the same construction. It is clear that he meant that species of possession that might be had by an infant, and by an infant during the continuance of the term of five hundred years. Is not a man considered to be in the possession of an estate, when there is a prior charge upon it? It was said that the estate might have been charged to its full value; but that was not the case. Mr. Fazakerly must have known how the estate, with respect to which he was making this proviso, was situated; he knew that it was subject to the jointure and to the sum for portions. He did not deal with the Gellibrand estate as unencumbered of those charges which he knew were existing at the date of his will; but he contemplated that estate as devolving subject

to those charges. He executed the settlement of 1801; and, unless he had clearly pointed out that he looked to a different state of title than that which existed, the court must presume he looked to that which did exist. Then, at the time when he made his will, he knew how the Gellibrand estate was circumstanced; and he directed his own estate to shift, with the possibility of the term of five hundred years coming into operation. If the Gellibrand estate devolved upon the second son, it could only devolve subject to the term; therefore, the second son has the same interest and possession as the testator contemplated, and as alone could have existed upon the devolution taking place.

[The Vice-Chancellor:—Suppose that the father and the eldest son had suffered a recovery, and limited the estate to the father in fee; and that, upon the death of the father, the eldest son being then dead, the estate had descended to the second son, it would not have descended under the settlement.]

It would still have been within the words of the shifting clause. Devolve means coming under the settlement or otherwise. The testator probably meant a devolution under the settlement, because that was the state of the title at the time; but, if the second son had taken either as a purchaser under the settlement, or as heir to his father and elder brother, it would not have made any alteration in the wish of the testator to prevent the union of the two estates; it would still have been a devolution upon the second son. However, the estate has devolved under precisely the same title as existed when the will was made, and which the testator must have contemplated. If there had been such a devolution as the court has referred to, it would have grown out of that which existed at the date of the will.

Then it was urged, as a fatal objection to the claim of the third son, that great changes have been made, in the Gellibrand estate, under the power of sale and exchange contained in the settlement. Now the testator knew that the power of sale and exchange existed; and he speaks of the Gellibrand estate devolving, with that power, upon the person entitled under his will.

[The Vice-Chancellor:—I do not think that there is much weight in that objection. I think that the trust-money represents the original estate.]

Is not the title the same? Do not the trustees hold the new estates upon the same trusts as the original estates? Besides, the last codicil republished the will, and made it pass the property as it then existed.

We submit that the event has happened upon which the testator intended his estates to go over, and that he has used terms as comprehensive as could be invented, to express that intention; and, consequently, that the Fazakerly estate has vested, under the shifting clause, in a third son.

Mr. Knight and Mr. Lowndes appeared for the defendant Ford, who submitted to act as the court should direct.

Mr. Walker, in reply:

The word "devolve" does not strictly apply to the event that has happened; for the plaintiff, at the time the will was made, was entitled to an estate tail. The testator considers the party as acquiring, by devolution, something which he had not before; but nothing of the kind has here occurred. It has been said that the testator must have known

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that the estate was settled: but it does not follow that every party who executes a deed, knows every thing that is contained in it. If he knew that the settlement related to the Gellibrand estate, it does not follow that he knew the channel in which it was put by the settlor. From the words of his will it is clear that he thought that the estate continued in the course of settlement limited by the will of William Gellibrand. He has used words which point, not merely to a descent or devolution, but to a descent or devolution in the course in which the estate was limited by the will. The words "Upon the son or heir male of the son," are strictly applicable to the descent under the will, and not to the acceleration of the estate, which is all that has occurred under the settlement of 1801. Supposing, however, that the testator did make his will with a full knowledge of the settlement, he has used no words to indicate an intention that his estates should shift upon the devolution of other estates than those mentioned in the settlement. If he had had any such intention, he would have used some such words as: "The estates for the time being subject to the limitations of the settlement." Then the testator has said that the party is to be in possession, or entitled to the rents and profits; but, by the accumulation clause, he has taken away both possession and rent, during minority.

The testator clearly intended that his estate should not go over, unless the whole of the Gellibrand estate, and nothing but that estate, devolved upon the plaintiff, who was the primary object of his bounty. Unless the court hold that the estate to devolve, is an estate as beneficial as that existing at the date of the will, no line can be drawn. If it is not the whole estate, what is it? Will a life-estate, or an estate charged to the full value, answer the purpose? The clause is a penal one, and must be construed strictly.

The Vice-Chancellor:—In this case, William Gellibrand, by his will, made in December, 1775, devised certain estates to Thomas Hawarden, his eldest nephew, for life; with remainder to his first and other sons in tail male. The testator died in 1787, and his eldest nephew took the name of Gellibrand. He had a son named Thomas; and, in the year 1801, Thomas, the tenant for life, and his son, the tenant in tail in remainder, suffered a recovery of the devised estates; and, by the recovery-deed, uses were declared in favour of Thomas, the son, for life, with remainder to the trustees for a term of years for the purpose of raising portions for his younger children, with remainders to the first and other sons of the marriage, successively, in tail male; and with the ultimate remainder to the right heirs of Thomas, the son. By the recovery-deed a power of sale and exchange was given to certain trustees; and Mr. Fazakerly, the testator, whose will is in question in this cause, was one of the trustees of the term for raising portions, and did, himself, execute the recovery-deed. The power of sale and exchange was in the usual form; and, in exercise of that power, some portions of the estate were sold, and new estates were purchased with the proceeds. Thomas, the son, had three sons; William, his eldest son, the plaintiff, his second son, and Hawarden Thomas, who is a defendant in this cause.

Mr. Fazakerly made his will, which was dated the 27th of June, 1807, and thereby devised all his real estates, to certain persons so as to give them the legal estate in fee, in trust for the second son of Thomas Gellibrand, the tenant for life under the settlement, in tail male, with remain-

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der in trust for his third and every subsequently born son, successively, in tail male, with divers remainders over: and, in his will, he introduced a proviso, that the persons who were devisees, should take the name and arms of Fazakerly, and another proviso, the effect of which was that, during the minority of any person entitled to the possession of his estates under the trusts of his will, the trustees should receive the rents, and, after making an allowance for the maintenance of the infant, should accumulate the surplus, and lay out the accumulations in the purchase of estates, to be conveyed to them upon the subsisting trusts of his will. Then he introduces the following shifting clause, upon which the question in the cause depends: "Provided always, &c."

The testator made several codicils to his will, the last of which was dated on the 28th of June, 1813; and he died in the same year. In the year 1816, William, who was the eldest son of Thomas, the tenant for life, died an infant; and, in 1828, Thomas died. In 1829 the plaintiff attained twenty-one; and the question is, whether, by virtue of the shifting clause, he has ceased to have an estate in tail male in the tenements devised by Mr. Fazakerly's will; and the decision of that question depends, mainly, upon the meaning that is to be put upon the word "devolve."

I am extremely unwilling, at any time, to make the decision of an important question depend upon the nice and accurate construction of any particular word; but I would rather construe the will by a fair and general interpretation of the words, having regard to what is shown, upon the face of the will, to be the obvious intention of the testator.

This testator has contemplated two events: the descent of the Gellibrand estate, and the devolution of it upon a person who might be tenant in tail male under his own will. Descent is out of the question. Did then the Gellibrand estate devolve? Now I apprehend that the common meaning of the word "devolve," when it is used as a neuter verb, is "to come in succession;" and it appears to me that, if the decision of this case depended solely upon the question whether or not, under the limitation in the settlement to the first and other sons of Thomas, the tenant for life, the Gellibrand estate did devolve upon the plaintiff, I should say that it did devolve upon the plaintiff, as far as the mere taking in succession by virtue of that limitation is concerned.

But there is something more to be considered; for it cannot be supposed that the testator meant, by the word "devolve," that the party upon whom the lands and tenements devised by William Gellibrand, were to devolve, should have a less interest in them at the time when the cesser of his own estate was to take place, than the unencumbered right to enjoy the whole rents and profits of the Gellibrand estate.

I am quite willing that the expression, "manors, lands, tenements and hereditaments, devised by the will of William Gellibrand," shall be taken to mean that which represented the Gellibrand estate at the time of the testator's death, so as to exclude those portions of the original estate, which, under the power of sale and exchange, had been sold or exchanged, and so as to include that property which, under the same power, had, by substitution, whether in the shape of land, or in the shape of money impressed with a trust to be laid out in the purchase of land, become part of the estate. But then I think that the testator cannot be supposed to have meant, by the term "devolution," the taking of less than the full,

unencumbered possession and enjoyment of that which was either the original estate or a substitution for it.

The testator has, certainly, framed the shifting clause with far less attention to the selection of words which would clearly point out his intention, than he has the clauses that precede it, and the power of sale and exchange, which follows it. In the clause which directs the taking of the name and arms, he has thus expressed himself: "I declare my will and mind to be, that all and every the person and persons who, by virtue of the trusts or devises hereinbefore contained, or of the proviso, or any codicil or codicils to this my will, shall become entitled to the actual freehold of the messuages, lands, tenements, rents and other hereditaments, the trusts of which are hereinbefore declared, shall and do within the space of one year, &c." Now there the testator has, expressly, pointed to the circumstance that the party to take the name and arms, is the party entitled to the actual freehold, not the party upon whom his estate should devolve, but he has designated the particular nature of the possession and the right that the party should have, who was to take his name and arms. Then, in the clause that directs the maintenance and accumulation, he has declared, "that, if at any time hereafter, the person or persons for the time being entitled to the possession or to the rents, issues and profits of the messuages, lands, tenements, rents and other hereditaments hereinbefore mentioned to be hereby devised, under the trusts of this my will, shall be under the age of twenty-one years, &c." So that he has marked, in words that leave no sort of doubt, what it was that he meant, and he has expressed himself that the accumulation shall take place in the event of the person being under twenty-one, and entitled to the possession, or to the rents of his estates. Then, in the power of sale and exchange, which follows the shifting clause, he has declared that it shall be lawful for the devisees in trust, at the request and by the direction of the person, for the time being, entitled to the possession, or to the receipt of the rents and profits of his estates, &c. Now it is very remarkable that, though there is that particular description which leaves no doubt upon the three clauses which I have mentioned, the shifting clause is left solely to depend upon the meaning to be attributed to the general word "devolve."

It was said that it must be taken that the testator made his will with reference to the settlement of 1801; and, I was so anxious to see what might be collected from a perusal of the will and all the codicils, that I did not think it right to decide the case, until I had perused them all. But I do not find any thing that at all warrants the assertion that the testator made his will with reference to the settlement of 1801: on the contrary, it rather appears to me (if the decision is to be founded, at all, upon that circumstance,) that the testator made his will without reference to the settlement of 1801, and that the only instrument that he has referred to, is the will of William Gellibrand.

Now I am quite willing to have this case decided upon the general words in the will, as they stand; and it is observable that the testator has not said, in case the party shall be entitled to the rents, issues and profits, or any part thereof, but has used words which, in my opinion, point to an estate of freehold or in tail, to an estate the possession of which would give the party a right to the whole rents and profits. By the recovery-deed of 1801, a charge was created upon the Gellibrand estate, and, therefore, the party who was made first tenant in tail under Mr. Fazakerly's

will, has not become entitled to the absolute, unfettered and unincumbered possession and enjoyment of the Gellibrand estate.

It is, I think, most consistent with the general words used by the testator, to give them a general meaning, and not to say that the party has had the estate devolve upon him, when, in fact, he has become entitled to the estate as tenant in tail in possession, but subject to a charge. I must construe this clause, in the same way as if the Gellibrand estate had been charged to its full value, that is, to such an amount as would have absolutely destroyed the beneficial enjoyment of it. The testator meant, in effect, to say that, if the party who should be tenant in tail of his estate, should ever have the full, beneficial enjoyment of the Gellibrand estate, he should cease to have the Fazakerly estate: but my opinion is that that event has not happened, and, consequently, that the shifting clause has not taken effect.

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4 *Simons*, 420.

A defendant became bankrupt during the examination of witnesses, and a supplemental bill was filed against his assignees: Held, that the depositions taken after the commission issued, and before the supplemental cause was at issue, could not be read against the assignees.

A., B. and C., having agreed for the purchase of certain mines, for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold, to the company, for 25,000*l.*, of which 10,000*l.* should be paid to F. the proprietor, and the remainder divided amongst themselves and certain of their friends whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which A., B. and C. were present, *but before the company was established*, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to F.; and a conveyance was afterwards taken from F. to the trustees of the company, and the 25,000*l.* was paid, out of the funds of the company, and distributed in the manner agreed upon. A suit having been instituted, *by some* of the shareholders, *on behalf of themselves and the others*, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had received into court, under an order upon motion: Held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission.

May 27, 30, 1831.

AFTER the cause was at issue, and whilst the witnesses were being examined, Dunston, one of the defendants, became bankrupt, and his assignees were brought before the court, by supplemental bill; but the examination of the witnesses was concluded before the supplemental cause was at issue.

The cause having come on for hearing,

Mr. Rose and Mr. Ching, for the assignees, objected to the depositions of any of the witnesses being read against their clients, on the ground

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that those witnesses had been examined in a cause to which their clients were not parties.

The Vice-Chancellor allowed the objection so far as it related to the witnesses who had been examined subsequent to the issuing of the commission, but overruled it so far as it extended to the witnesses who had been previously examined.

The other facts of this case may be collected from the judgment, and from the reports of prior proceedings in the suit, in 4 Russ. 562, and 1 Russ. & Mylne, 150, note.

The Solicitor-General, Sir E. Sugden, Mr. Lee and Mr. Fane, appeared for the plaintiffs.

Sir Charles Wetherell, Mr. Pepys, Mr. Knight, Mr. Phillimore, Mr. Spurrier and Mr. Lowndes, for the defendants in the original suit.

The Vice-Chancellor:—Mr. Flattery being lessee of certain iron and coal mines, in Ireland, called the Arigna Mines, and wishing to dispose of his interest therein, some negotiation took place, between him and Sir William Congreve, to which Messrs. Joseph and Henry Clarke afterwards became parties, the effect of which was, that Flattery agreed to sell his interest in the mines for 10,000*l.* It is indisputable that, if Sir William Congreve and the Messrs. Clarke had agreed, amongst themselves, that they would form a partnership or a company for the purpose of working the Arigna Mines, and had held out, to the persons who should form the company, that it should be formed on the basis that they should pay 15,000*l.* to Sir William Congreve and the Messrs. Clarke, as the consideration for their having the mines, no objection whatever could have been made to the transaction; and the effect would have been that 25,000*l.* would have been taken, from the funds of the company, 10,000*l.* of which would have been applied to pay, to Mr. Flattery, the price of the purchase, and 15,000*l.* would have been given, in the nature of profit, to Sir William Congreve and the Messrs. Clarke, for giving up their interest in the mines, and making them the property of the company. But the objection to the transaction, as it appears from the pleadings and evidence in the cause, is that Sir William Congreve and the Messrs. Clarke never disclosed, to the persons who, through their instrumentality, became the company, what the real transaction was; for it cannot be doubted, by any one who has attended to the proceedings in this cause, that the persons who became members of this company, could not possibly know that it was the intention of Sir William Congreve and the Messrs. Clarke, that the 15,000*l.* should be paid, out of the funds of the company, for the benefit of Sir William Congreve, the Messrs. Clarke, and those gentlemen whom they permitted to participate in it.

Two agreements, both of which were dated the 30th of October, 1824, were prepared; by one of them, which purported to be made between Flattery of the one part, and John Vivian and Henry Joseph Besouth Hinde (who were agents appointed, for that purpose, on behalf of Sir William Congreve and the Messrs. Clarke, but who never signed the agreement) of the other part, it was agreed that Flattery would assign his interest in the mines, to Vivian and Hinde, or to whom they should appoint, for 10,000*l.*; that a company should be formed for the purpose of working the mines; and that Flattery should receive one-fifteenth of the profits to arise from the working thereof, and also one thousand shares in the company when it should be formed. By the other agreement,

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which was made between Thomas Holroyd, on behalf of Sir William Congreve, of the one part, and William Clarke, on behalf of himself and his brother, of the other part, the parties agreed to form a company for the purpose of working the mines, and, for that purpose, that Sir William Congreve should be the chairman and one of the directors of the company, and that the defendants Brogden, Bent, and the plaintiff, Morgan, but who afterwards declined to accept the appointment, and one other gentleman to be thereafter nominated by Sir William Congreve, should be the directors appointed by Sir William Congreve, and that the defendants Joseph and Henry Clarke, T. F. Power, A. A. Surtees, and John Dunstan should be other directors appointed by the Clarkes; that Matthew Surtes should be the auditor appointed by Messrs. Clarke; and that Sir William Congreve should have power to appoint another auditor; that the defendant, Beaubien, should be the secretary or agent appointed by both parties. The agreement next stipulates who are to be the counsel, solicitors and bankers of the company; and then it recites that the mines were originally purchased, by Sir William Congreve and the Messrs. Clarke, of Mr. Flattery, for 10,000*l.*, and that, subject to certain charges, a conveyance thereof was, by the direction of the purchasers, made to a nominee on their parts, (but which was not the fact, for no such conveyance was ever made): and it further recites that Sir William Congreve and the Messrs. Clarke, by their nominee as aforesaid, had agreed for the sale of the mines, for 25,000*l.*, to the intended company, and that it had been agreed that 15,000*l.*, the difference in the purchase-money, should, when received, be divided as follows, namely, that 1000*l.* should be paid to the defendant John Hinde, 1000*l.* to the defendant Beaubien, as the agents of Sir William Congreve, 2000*l.* to Messrs. Clarke, to be divided by them amongst their agents, that Sir William Congreve and the Messrs. Clarke should receive 2000*l.* each, and that the remaining sum of 5000*l.* should be divided, by Sir William Congreve and the Messrs. Clarke, either amongst the directors, generally, Sir William Congreve being one, or equally amongst themselves.

The several persons mentioned in this latter agreement, with the exception of the plaintiff Morgan, having consented to act as directors of the company, a prospectus was printed, and deeds were prepared for establishing the company, and for vesting the mines and other property in trustees. On the 5th of November, 1824, a meeting of the directors was held, at which Henry Clarke, Dunston, Power, A. A. Surtees, Matthew Surtees, Flattery, and John Hinde and Thomas Holroyd and William Healing, the solicitors of the company, were present, Dunston being in the chair; and it was resolved that the solicitors of the company should be directed to complete the agreements, for the purchase of the works from Mr. Flattery, for the company of proprietors, for the sum of 25,000*l.* sterling, subject to the further payment to him of one-fifteenth part of the net profits of the undertaking; and that the sum should be paid, forthwith, by cheques on the bankers, on the execution of the assignments; that the solicitors should be directed to complete the deed of settlement ready for signature by the proprietors; that the company should be called, "The Arigna Iron and Coal Company;" that the capital should be 300,000*l.*, in shares of 50*l.* each; that 5*l.* per share should be paid down, at the time of subscribing; and that Henry Clarke should be requested to take all such means, as to him might seem proper, for establishing the company,

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and to convene another meeting when the business might appear to him to require it.

The terms of the assignment which was taken of Flattery's interest in the mines, were such as, of necessity, to keep back, from the knowledge of any person who might read it, the fact that 10,000*l.* only was paid to Flattery: because it purports to be an assignment, to the trustees of the company, for 25,000*l.* paid to Flattery. The deed of settlement, too, which was made between the several persons whose hands and seals were thereunto set and affixed, other than and besides the three gentlemen who were the trustees of the company, of the one part, and the trustees, of the other part, recites that the 25,000*l.* was paid out of the moneys of the company. Both these deeds were executed in December, 1824.

Then, on the 1st of January, 1825, another meeting was held, at which Sir William Congreve was in the chair, and Bent, Dunston, Maclean, Power, A. A. Surtees, Joseph Clarke and Henry Clarke, were present; and it appears, by the entries that were made of the proceedings of the meeting, in the books of the company, that the solicitors, being in attendance, reported that the assignment, from Mr. Flattery to the trustees, had been executed by Mr. Flattery and the trustees, and that the deed of settlement had been engrossed and executed by many of the trustees, directors and other officers and proprietors, and was in course of being signed by the remainder; and that cheques on the bankers had been drawn for payment of the consideration money payable to Flattery. So, that on that day, there was a representation held out, to those who were actually the members of the company, and also to those who might thereafter become members of it, that the payment of the 25,000*l.* had been made to Flattery. Now, the cheques which were drawn for that sum have been produced; five of them were signed by Dunston, Power and Henry Clarke, and the remainder by Dunston, Power, A. A. Surtees and Joseph Clarke. It is quite clear that those persons must have known what was the intended disposition, and the actual disposition of the whole of the money for which these cheques were drawn: and I apprehend that it was the duty of all those other persons who were directors, and who appear to have attended this meeting, to take care, as between themselves and Flattery and the members of the company, that the money should be applied in the manner in which it was held out, to the subscribers, that it was to be applied. It was, however, applied in a different way, for part was paid to Mr. Flattery, and the remainder was applied for their own benefit. The distribution of the money was made by Henry Clarke (who received the whole of the money for which the cheques were drawn), at a meeting that was held on the 15th of January, 1825. The sum of 1000*l.* was paid to Beaubien; 2500*l.* was paid to Sir William Congreve; Henry Clarke and Joseph Clarke retained 1047*l.* each, and a sum to the same amount was handed over to each of the defendants, Bent, Brogden, Maclean, Dunston, Power, A. A. Surtees, and a like sum was paid to Sir William Congreve, for the defendant Schneider, who was abroad.

It is useless for the Messrs. Clarke and Sir William Congreve to state, as they have done in their answers, that they apprehended that the sums which so came to their hands, were profits which they were entitled to; for it is impossible that they could, if they fairly exercised their judgments, which, as directors, they were bound to exercise, form any such

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opinion: and it is perfectly plain to my mind, that it was not competent to those who were forming a company, thus to deal with the funds of the company, making at the same time the representations that they did make. If they had been dealing with one individual only, no doubt could be entertained upon the matter.

Two objections were made to the relief that is asked in this case: first, it was said that the property was worth 25,000*l.* So it might have been; but, in my opinion, the value of the property is quite immaterial; for the question here is, what was held out, to the company, to have been the sum actually paid for it; and I conceive that, if there was a misrepresentation in that respect, the parties who made that misrepresentation must be answerable for it. The other objection that was made was, that the mines were not, and could not have been, purchased for the company; for that, at the time when the agreement was entered into, there was no company in existence. Strictly speaking, it is true that there was no company in existence: but these gentleman were endeavouring to form a company, and they had taken upon themselves the character of directors for the benefit of all persons who had agreed to be, or might afterwards become, members of the company. The 25,000*l.* was to be paid out of the funds which should be subscribed by persons who might, thereafter, become members of the company; and my opinion, therefore, is, that all those persons who might, thereafter, become members of this company through the instrumentality and representations of those directors, are entitled to the protection of this court.

Then it was said that there can be no relief except in the way of restitution of the mines; but that appears to me to be a fallacy. On the 22d of June, 1825, an act of parliament was passed which establishes this company, and directs that its capital shall be 300,000*l.*; and I apprehend that, in no other way, can there be any relief in this case, than by making those who have subtracted the 15,000*l.* from the funds of this company, repay that sum; for it would be no relief to make Flattery take back the mines; that would destroy the company altogether. When these directors represented that 25,000*l.* was to be paid for the purchase of the mines, it must be considered that they intended that the company should have the mines, and that they meant it to be understood that that was the lowest price at which they could be purchased. What is complained of, is that, by improper representations, 15,000*l.* has been withdrawn, from the funds of the company, and paid into the pockets of private individuals. Is it not obvious, therefore, that the relief to be given, is the restitution of the 15,000*l.*?

Then it was asked, who are the parties who are to have the benefit of that restitution? Upon that point there is not the slightest difficulty: for the act of parliament having constituted the company and declared that the capital should be 300,000*l.*, the persons who are to have the benefit of the restitution, are those who now are, and those who, by assignment from the present proprietors, may become members of the company. The act of parliament, of course, meant that there should be deducted, from the capital, whatever had been *bonâ fide* paid for the purchase of the estates, which it notices; but it never meant that there should not be a defalcation in the capital made up, which had been improperly occasioned by the persons who had the power of disposing of it.

With respect to the defendant Dunston, it was said that it was only a case of *assumpsit*, and that the plaintiffs had no right to what has been

paid into court, in respect of the share of the 15,000*l.* which he received. I admit that, if there had been no order made for paying the money into court, the plaintiffs would now have established, for the first time, a demand against him; and the result of this suit would have been merely to give, to the plaintiffs, a right to prove against Dunston's estate. But when, in the progress of the cause, and during the solvency of Dunston, the court has ordered the money, which is the subject of dispute, to be paid into court, my opinion is that the court cannot hold that the money was paid in, by way of security merely, and is now to be returned, and that the plaintiffs have only a right to prove against Dunston's estate: but I think that the plaintiffs are entitled to take the fund as the specific thing to which they are entitled.

There must be a declaration and decree according to the prayer of the bill, except that the bill must be dismissed, with costs, as against the defendants Hine and Schneider, as to whom no case has been made out.

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4 *Simons*, 430.

Testator devised his real and personal estates, to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren, till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and, on the death of each of them leaving such child, to convey the parent's share to such child: and he empowered his trustees, after the death of the father of his grandchildren, to convey, to his grandsons, absolutely, the shares of his estates, to which, under the previous trusts, they would be entitled for their lives. A petition, by one of the grandsons, for an increase of the maintenance provided by the testator, was dismissed, the disposition of the property not being such as that the grandchildren must, of necessity, take the whole fund.

May 31; June 2, 1831.

WILLIAM TURNER, by his will, dated the 16th of May, 1829, gave all his real and personal estate to trustees, in trust to sell his personal estate, and to lay out the proceeds in the usual securities, and, out of the rents of his real estates, and the interest and dividends of the securities in which the produce of his personal estate should be invested, to pay to his daughter, the defendant, Mary Ann Merryweather, the wife of the defendant William S. Merryweather, an annuity of 500*l.*, for the joint lives of herself and her husband, and, in case she should survive her husband, then an additional annuity of 500*l.* for the remainder of her natural life; and, upon further trust, to pay to or apply for the benefit of his said daughter's children, who were the plaintiffs in the cause, the following annuities, namely, to the plaintiff, W. S. M. Turner, 300*l.* a year, to the plaintiff Mary Ann Merryweather, 200*l.* a year, to the plaintiff Mary Frances Merryweather, 150*l.* a year, to the plaintiff

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Montague John Turner, 150*l.* a year, to the plaintiff Marcus Turner, 150*l.* a year, to the plaintiff Sarah Merryweather, 150*l.* a year, such annuities to commence from the quarter-day next preceding the testator's decease, and to cease on his said grandchildren attaining twenty-five: and he directed his trustees to apply the whole, or such parts of those annuities as they should think proper, in the bringing up, maintenance, education and advancement in the world, of the plaintiffs until they should attain twenty-one, without any reference to the ability of their father to maintain and educate them; and he directed that his trustees should have the management and bringing up of his said grandchildren, without consulting their father or mother, and that whatever surplus there might be of the said annuities, should be laid out in the usual securities for the benefit of his said grandchildren, and be transferred to them on their attaining twenty-one; and he also directed his trustees, out of the income of his real and personal estate, to repair and keep up the buildings on his real estates, and, until the plaintiffs should attain twenty-five, to invest the surplus income of his real and personal estate in the funds, and he directed that the stock to be purchased therewith should form part of his residuary personal estate; and he directed his trustees, when his grandchildren should respectively attain twenty-five, to pay, to them respectively, the income of his real and personal estates, in the following shares, that is to say, to W. S. M. Turner three-sixteenths, to Mary Ann Merryweather two-sixteenths, for their lives respectively, &c., with benefit of survivorship on any of them dying under twenty-one, and without having any child that should live to attain twenty-one, and, upon the death of any of his said grandchildren leaving a child or children that should live to attain twenty-one, then to convey, to such child or children, in fee, such shares of his real and personal estate as each grandchild so dying should, at the time of his or her death, be entitled to the income of, under his will, to hold the same unto and to the use of such children, if more than one, in equal shares as tenants in common, and to their heirs, executors and administrators. And the testator declared that, in case any of his said grandchildren should die under the age of twenty-five years, leaving any child or children that might attain the age of twenty-one years, then such child or children should be entitled to such share or shares of his real and personal estates as the father or mother of such child or children would have been in the possession of, or entitled to the income of, at his or her decease, in case he or she, at the time of his or her death, had attained the age of twenty-five years. And his will was that if any of his said grandchildren should die, leaving a child or children who should attain the age of twenty-one years, and any other of his grandchildren should afterwards die, without leaving any child or children that should live to attain the age of twenty-one years, then that every grandchild who should have so died leaving a child or children that should attain the age of twenty-one years, should, for the purpose of such distribution as aforesaid, be considered as having survived the grandchild or grandchildren who should die without leaving any child or children that should live to attain the age of twenty-one years; and he directed that the income of the presumptive or expectant shares of any child or children of any of his said grandchildren who should die leaving any child or children, of and in his real and personal estate, should, during the respective minorities of such children, be applied for their respective maintenance and education. And he appointed his trustees to be guardians of his grandchildren, and requested them to take care of their persons and for-

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tunes, and to attend to their education: and he authorized and empowered his trustees, from time to time, after the death of the husband of his daughter, if such trustees or trustee should, in their or his discretion think fit, to advance, convey, assign or transfer, the respective shares to which his said grandsons respectively would only be entitled for life under the trusts aforesaid, of and in his real and personal estates, or any or either of such shares, or any part or parts thereof, unto his said grandsons respectively, or any or either of them, to hold the same unto and to the use of such grandson or grandsons, his or their heirs, executors, administrators or assigns for ever, freed and discharged from all trusts and contingencies whatsoever under his will.

The testator died in September, 1829. Previous to his death, he placed the plaintiff, W. S. M. Turner, at the University of Cambridge, and intended him ultimately to follow the profession of the law. And, accordingly, the plaintiff, having finished his studies at the university, was entered at one of the Inns of Court: upon which he presented a petition in the cause, praying for an increase of 100*l.* a year, to the provision for his maintenance and education, made by the will, on the ground that that provision was not sufficient to enable him to pursue his professional studies.

Mr. Knight and Mr. Spurrier, for the petitioner, said that, where a legacy was given, to a child, by its parent, or, as in this case, by a person who had placed himself *in loco parentis*, the court would allow maintenance for the child, though none were given by the will, notwithstanding the legacy was contingent or given over. Incledon *v.* Northcote, 3 Atk. 430. 438; Mole *v.* Mole, 1 Dick. 310; Brown *v.* Temperley, 3 Russ. 263; Acherley *v.* Vernon, 1 P. W. 783; Beckford *v.* Tobin, 1 Ves. 308; Hill *v.* Hill, 3 V. & B. 183. That here the petitioner's interest under the will was vested: and that, as the court would allow maintenance where none was provided by the testator, so it would increase the maintenance where it was provided, but was insufficient: Aynsworth *v.* Pratchett, 13 Ves. 321; Stretch *v.* Watkins, 1 Madd. 253.

Mr. Rose and Mr. Keene opposed the petition, and contended that the maintenance provided by the testator was sufficient; that the testator had directed the surplus income of his estates to be accumulated; and that the shares of the grandchildren were not vested in them absolutely, but were given over in the events mentioned in the will; and, therefore, that the court could not increase the allowance without making a new will for the testator.

The Vice-Chancellor:—When this petition was heard before me, I had a distinct recollection that Lord Eldon had decided the very point, and, on referring to my notes, I found the cases that were in my mind at the time.

In this case the surplus income of the real and personal estates, after the payment of the specified sums, is directed to be accumulated, and to form part of the testator's residuary personal estate. Then when the grandchildren shall respectively attain the age of twenty-five years, the trustees are to distribute the rents of the real estates, and the interest and dividends of the personal estate, amongst the grandchildren, in certain shares, for their respective lives; and, if any of the grandchildren die without leaving a child or children who shall attain twenty-one, the share of that grandchild is to go to the survivors; and, upon the death of each grandchild leaving a child or children who shall attain twenty-one, the

trustees are to convey and assign, to such child or children, the same share of the *corpus* of the property, as the parent was entitled to in the income. Then there is a proviso empowering the trustees, after the death of the testator's son-in-law, to convey and assign, to the grandsons absolutely, the shares which they would have been entitled to, only for their lives, under the previous trusts. The disposition made, by this testator, of his property, is such that you cannot say that the grandchildren will, of necessity, take the whole fund. Now, in the case *ex parte* Kebble, 11 Ves. 604, Lord Eldon, C. says: "The case in which maintenance has been allowed, though not given by the will, is where there are children, some or one of whom must take the property, and all have an equal chance by surviving, and a present interest. But it cannot be done, if there is a gift over, or if the children are not all the persons among whom it is to go, as in Sir F. Eden's case, where Lord Rosslyn had directed it, but, upon an application for an increase of the allowance, I did not think myself justified in following that, and refused it; as those children might be the persons to take the whole; but future children, then unborn, might be the persons to take a part of it." Then at the end of the same case, Lord Eldon says that there were some older cases than those that were produced in Greenwell *v.* Greenwell; within some of which this would fall, but his lordship said he did not know the principle upon which those cases could be maintained, and refused to make the order. No doubt Mole *v.* Mole is an older case; and it professes to proceed on the authority of still older cases. In Errat *v.* Barlow, 14 Ves. 202, Lord Eldon says: "I have looked through all the cases upon this subject. When Greenwell *v.* Greenwell was first stated, the observation made by Lord Rosslyn, was that the application to him was to make a will for the testator; but two cases were produced upon that occasion." His lordship then alludes to Cavendish *v.* Mercer, and says: "The children had, as among themselves, an equal chance to take the capital with the accumulation, and the mother, who was entitled under the limitation over, consented to the application. That case therefore is an authority only that, where the court sees that it is for the benefit of the infants, the chance of surviving being equal, and can procure the consent of all persons interested, the court will take the chance of controverting the direction of the will. As to the case before Lord Thurlow, (Fendall *v.* Nash, 5 Ves. 197, note), I cannot bring myself to think that case properly decided; as, upon certain contingencies, both the principal and the interest would have gone to individuals who not only did not, but could not consent; not being then in existence. In the event of the death of a child under the age of twenty-one, leaving issue, the accumulated property would have gone to that issue; and how the court could give, to the infants, that property, which, in that event, would belong to others, I cannot conceive. The result is that, if the chance of surviving is equal among all, and no other interest that, upon any contingency, would take effect, will be defeated, maintenance shall be allowed out of the interest: but it is impossible to give it where, in any event under the operation and construction of the will, that interest may possibly belong to other persons." Therefore these decisions have directly overruled the case decided by Lord Rossyln and the older cases: and Lord Eldon has opposed his authority to the authority of Lord Thurlow in Fendall *v.* Nash: and my opinion is that I cannot grant the prayer of this petition.

Grigg *v.* Cocks.

4 *Simons*, 438.

A., a solicitor in the country, received, from a client, a sum of money, which was to be paid, by him, into the Court of Chancery on the client's account. A. obtained a bill for the sum from a country banker, and remitted it to his bankers in London, without stating the reason for which the amount had been paid to him. At the same time he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A. died, and a few days afterwards the bill became due and was paid, and the bankers carried the amount to A.'s general account. The bankers, for some time after they had received notice, from the client, of the circumstances under which the amount of the bill had been paid to A. continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix: Held, that as there was no agreement binding the bankers to keep separate accounts as to the 450*l.* and the amount of the bill, and as they had no notice, till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill.

June 7, 28, 1831.

IN May, 1822, Joseph Norway, of St. Columb in Cornwall, solicitor, having a common banking account with the defendants, Cocks & Biddulph, who were bankers at Charing Cross, borrowed of them 250*l.*, for which he gave them his own note to that amount, payable on demand, and also a similar note of the defendant, Mary Norway, for 500*l.* as a collateral security. In September, 1822, the bankers advanced to Joseph Norway 200*l.* more, on the security of the joint and several note of himself and the defendant Ann Bennett, and of the transfer, into the names of one of the partners in the bank, of 233*l.* 6*s.* 8*d.* consols belonging to Ann Bennett. The two sums of 250*l.* and 200*l.* were entered, in the usual manner, in the general account between Norway and his bankers.

In 1825, the plaintiffs Richard and Robert Grigg being possessed of a farm in Cornwall for the remainder of a term of years, subject to a mortgage to one Tremaine, and having agreed to purchase the reversion, borrowed, through Joseph Norway their solicitor, 1500*l.* of the plaintiff John Bennett, to enable them to pay off the mortgage, and to pay their purchase-money (as they had been ordered to do) into court in a suit of Trefusis *v.* Clinton. By articles of agreement, dated the 25th of August, 1825, and expressed to be made between Messrs. Grigg, of the first part, Tremaine, of the second part, and John Bennett, of the third part, reciting that Bennett had paid two sums, one to Tremaine, in discharge of his principal and interest, and the other to the Messrs. Grigg, amounting together to 1500*l.*, Tremaine agreed, when requested by Bennett, to assign the mortgage to him, and the Messrs. Grigg agreed, as soon as practicable after their purchase-money was paid into the bank, to mortgage the farm, in fee, to Bennett, as a security for the 1500*l.* and interest. This agreement was not signed by Tremaine, but the other parties signed it, and their signatures were witnessed by William Jago, a clerk to Nor-

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way. Jago (who was examined as a witness for the plaintiffs) deposed as follows, respecting the receipt and disposition of the 1500*l.*, and of a further sum of 200*l.*; namely, that, on the 25th of August, 1825, Norway received 1500*l.* from Bennett, for the purpose of advancing it to Messrs. Grigg, to enable them to pay their purchase-money: that, on the 26th of August, 1825, he, Jago, by Norway's direction, received 200*l.*, but from whom he did not recollect, on account of the Messrs. Grigg, for the same purpose; and, on the following day, he, by Norway's direction, paid those two sums into the Bank of Messrs. Praed, Rogers & Co., of Truro, and received, in respect thereof, two bills of exchange, one for 1000*l.*, dated 26th August, 1825, and payable, thirty days after date, to Norway or order, and the other for 700*l.*, and, on the same day, he delivered them to Norway. On the 3d of September, 1825, Norway sent the bill for 1000*l.* to Messrs. Cocks & Biddulph, in a letter of that date, and in the following words:

"*St. Columb*, 3d Sept. 1825.

"Dear Sirs:—I enclose you a bill on Preads & Co. for 1000*l.* to my credit: and I will thank you to pay my bill, of the 1st instant, for 39*l.* 7*s.* 1*d.* in favour of John Caspoder, at fifty days, and also my acceptances of James Thomas's bills, for 30*l.* due the 14th instant, and 20*l.* due the 19th instant.

"I am, &c.

"Joseph Norway."

At the time when the bill was received, there was a balance of 13*l.* 8*s.* in Norway's favour. On the 25th of September, 1825, Norway died suddenly, having appointed his wife, Patty Norway, his executrix. The bill for 1000*l.* became due on the 28th of that month, and the amount was received by Cocks & Co. The other bill for 700*l.* was found, in Norway's pocket-book, a few days after his death; and Jago, in answer to inquiries made respecting it by the defendant, Patty Norway, the widow of Joseph Norway, informed her that it was part of a sum of 1700*l.* intended to pay for the plaintiffs' purchase, and that 1000*l.*, the remainder thereof, had been sent, by Norway, to Cocks & Co. Mrs. Norway, upon receiving this information, delivered up the bill for 700*l.* to the plaintiffs, who obtained from Praed & Co. a new bill in lieu of it, and the money thereby secured, was applied for the benefit of the plaintiff John Bennett.

On the 7th of October, 1825, Mr. Collins, the plaintiffs' solicitor, wrote the following letter to Cocks & Co.:

"Sirs:—It appears by the books of the late Mr. Joseph Norway, that he remitted you, on the 3d ultimo, a bill for 1000*l.* on account of the purchase of an estate in this neighbourhood, to be paid into the Bank of England. The purchaser is about to remit the remainder of the money and complete the purchase. I shall, therefore, be obliged by your informing me whether the proceeds of the bill were so applied."

On the 8th of October, 1825, Cocks & Co. wrote in answer as follows:

"Sir:—We are favoured with your letter of the 7th instant, and have to inform you, in answer, that, on the 3d September, the late Mr. Joseph Norway remitted to us a bill for 1000*l.*, on his account. He did not state to us that the amount was applicable to a specific purpose. We imagine that you are aware that no part of his balance can be drawn out, until the probate of his will is left with us, to be entered in our books."

Mrs. Norway having applied to Cocks & Co. for an account of her late

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husband's balance in their hands, received the following answer, dated the 26th of October, 1825:

"Madam:—We are favoured with your letter of the 23d instant, and have to inform you that the balance in our hands due to the late Mr. Norway, is 975*l.* 16*s.* 6*d.* We have advanced to him, upon two joint notes, 250*l.* and 200*l.* Those two notes must, of course, be charged against the balance. We cannot part with any part of the balance without first having the probate of his will or the administration."

Cocks & Co. had kept a separate account as to the two sums of 250*l.* and 200*l.*, until some time in 1826, when those sums were carried to Norway's general account. On the 15th of August, 1827, Cocks & Co. paid over, to Mrs. Norway (who had only shortly before proved her late husband's will), the sum of 513*l.* 7*s.* 3*d.*, being the balance of his account, after deducting the 250*l.* and 200*l.*, secured by the promissory notes, which securities Cocks & Co. had delivered up to Mrs. Norway, Mary Norway and Mrs. Bennett, in November, 1826, but they did not re-transfer the stock to Ann Bennett. The 513*l.* 7*s.* 3*d.* was afterwards paid into court, by Mrs. Norway, in obedience to an order made in a suit instituted against her by her husband's creditors.

The bill insisted that the bill of exchange for 1000*l.* was not the property of Joseph Norway, but was the property of the plaintiffs, the Messrs. Grigg, the plaintiff, John Bennett, having an interest in the due application thereof; that Cocks & Co. had no right to retain or apply any part of the 1000*l.* in satisfaction of their demands on Norway's estate, nor to pay any part of it to his executrix, and that she had no right to receive it as personal estate of her late husband; that Cocks & Co., having had securities for what Norway was indebted to them, if they had any right to apply any part of the 1000*l.* in reduction of their demand, the plaintiffs were entitled to stand in their place, as against Ann Bennett and Mary Norway, the sureties; that Cocks & Co., after they had received notice of the plaintiffs' claim, retained part of the 1000*l.* to satisfy their demand on Norway's estate, and paid over the surplus to his executrix, and delivered up the notes to her, and to the defendants Mary Norway and Ann Bennett; that Joseph Norway died insolvent, and that his widow was not of ability to answer what she had wrongly received. The bill prayed that it might be declared that the bill for 1000*l.* was the property of the Messrs. Grigg, and that Cocks & Co. had no right to retain any part of the produce thereof, or to pay over the same to Mrs. Norway, and that Cocks & Co. might be decreed to pay, to the Messrs. Grigg, the 1000*l.*, with interest; or, if the court should be of opinion that Cocks & Co. had any lien on the 1000*l.*, then that the amount of such lien might be ascertained, and that the residue of the 1000*l.* and interest might be paid, to the Messrs. Grigg, by Cocks & Co., or by Mrs. Norway: and that it might be declared that they were entitled to the benefit of the securities deposited with and transferred to Cocks & Co., by Joseph Norway, and that Cocks & Co. and Mrs. Norway might be compelled to indorse and deliver over and transfer, to the Messrs. Grigg, the said securities, and that they might be empowered to sue the parties liable thereon, they indemnifying Cocks & Co.; or, if such securities had been transferred or delivered over to Ann Bennett and Mary Norway, then that they might be decreed to re-transfer or make good the same, to the Messrs. Grigg.

Cocks & Co., by their answer, said that the bill for 1000*l.* was paid in,

generally, to the credit of Joseph Norway's account, and that, until the receipt of the letter of the 7th of October, 1825, they had not any notice or reason to suspect that the bill was not his property: that they entered the sums of 250*l.* and 200*l.* which had been actually credited to, and drawn out by Joseph Norway, and which were secured by the promissory notes for those amounts, to the debit of his account, before they paid over any balance to his executrix: that Joseph Norway, having paid in the bill, generally, to his own account, without any specific appropriation thereof, they considered themselves merely as his agents, in regard to such sum; and they submitted that, as such agents, they were bound and compellable to follow the directions that might be given, by him or his personal representative, as to the disposal thereof, and that they were not and could not be made responsible, to any third person, for their mode of dealing with that bill, and that, accordingly, after having carried the proceeds of the bill to his account, they paid the balance of his account to his executrix, and delivered up all securities which they held for the repayment of any sum which might have been advanced, by them, to Joseph Norway, and that they had carried the dividends of the consols, which had been received since Norway's death, to the credit of Ann Bennett's account, and that they intended to re-transfer the capital to her, whenever she should require them so to do.

Mr. Tinney and Mr. Lynch, for the plaintiffs:

Joseph Norway was a trustee, of the 1000*l.*, for the plaintiffs. That sum was paid to and received by him for the purpose of paying for the farm which the plaintiffs agreed to purchase. The bill was what is called a short bill, and might have been recalled, at any time, by Joseph Norway. The bankers admit that they received the bill as his agents. Norway clearly could not have retained the bill, or the amount of it, against the plaintiffs; and his agents cannot stand in a better situation with respect to it, than he did. The bill was not discounted, but was entered short. On the 7th of October, 1825, Cocks & Co. had notice, from Collins, of the circumstances under which the bill came to Norway's hands, and they, at first, claimed no lien on the bill or its proceeds. It was in their hands merely that they might receive the amount of it; and, after they had notice that Norway was a trustee of the bill, they had no right to pay over the amount. The 1000*l.* could not be legally applied, by Mrs. Norway, as belonging to her late husband's estate: she could not legally demand it of the bankers; and, if she did, they had no right to pay it to her. There is a distinction between payment of money to the person who remitted it, and to his executors. Burdett *v.* Willet, 2 Vern. 638. In Taylor *v.* Plumer, 3 M. & S. 562, the court held that the money, so long as it could be traced, was the property of Sir Thomas Plumer. Whitecomb *v.* Jacob, 1 Salk. 160; Hassall *v.* Smithers, 12 Ves. 119. The bankers having admitted that they had no interest in the bill, but that they received it merely as the agents of Norway, could have no right to pay the amount to his executrix; but, as soon as they had notice that the money belonged to the plaintiffs, they became trustees for them, and ought to have paid it to them. They had notice in October, 1825, and in August, 1827, they paid the balance to Mrs. Norway. They had not the slightest right to deduct the 250*l.* and 200*l.*; those sums being due, from Norway, on another account. Norway had a general account with them, and he remitted the bill on that general account. The

[Grigg *v.* Cocks.—4 Sim. 438.]

account as to the 250*l.* and 200*l.*, was a totally distinct account. Cocks & Co. took securities for those two sums, and never entered them in the general account till 1826, which was long after Norway's death; and Norway might have drawn out the 1000*l.* without their being entitled to retain any part of it, in respect to either of those sums. At the utmost, they were entitled to a lien only, on the 1000*l.*, for their own indemnity. Thompson *v.* Giles, 2 Barn. & Cress. 422; Giles *v.* Perkins, 9 East, 12. They were bound to make the most of the securities; but they have delivered them up, in fraud of the plaintiffs, to Mrs. Norway, Mary Norway and Ann Bennett, and they say that they are ready to transfer the consols to her. *Ex parte Armistead in re Dilworth,* 2 Glyn. & Jam. 371.

The bankers had no right to make themselves debtors to Joseph Norway in respect to the 1000*l.* which they received as his agents. If they were debtors to him, they were debtors to him as a trustee for the plaintiffs as soon as they had notice of the plaintiffs' claim: therefore the court will not allow them to deduct the 250*l.* and 200*l.*, which he owed them in his own right from the amount of the bill, which was received by them in a different right.

At all events the securities must be delivered up to the plaintiffs, and Mrs. Norway, who had notice of their rights, must pay over to them the balance which she received from the bankers, and the consols must be transferred to the plaintiffs.

Sir Edward Sugden, Mr. Pepys, Mr. Piggott, Mr. Thompson and Mr. Wright, for the defendants:

There is no case in which a banker has been held liable to pay, to a third person, money that has been deposited with him, by a customer. When money is placed in the hands of a banker, it cannot be followed; it is always to be forthcoming; but, until drawn for, it is a mere general debt, for which the banker is answerable only to his customer. Norway sent the bill to Cocks & Co.: and they received the amount when it was due, and carried it to their customer's account. It makes no difference whether Norway was living or dead when the bill was paid. The money formed part of his general assets. In the cases referred to, the money, which had been received for a particular purpose, remained in the hands of the party who had committed the breach of trust. Here the money was in the hands of a third party, who was ignorant of all the circumstances under which it had been paid to Norway. The bankers were liable to Norway in respect of the bill: he had a legal demand against them, which they must have answered. They could not dispute his title, nor involve him in equities by filing a bill of interpleader.

Unless a case of immediate appropriation is made out, money cannot be followed. In this case it does not appear how the plaintiffs meant the money to be applied. The bill states that John Bennett, instead of making any payment to Tremaine, the mortgagee, paid the whole 1500*l.* to Norway, according to his, Norway's direction, he being to make the payment to Tremaine, and to procure his signature to the articles of agreement. But Jago, in his evidence, states that Norway received the 1500*l.* from John Bennett, for the purpose of advancing the same to Richard and Robert Grigg, to pay for the purchase of the estate which they had contracted for, and that he, Jago, afterwards, by Norway's direction, received 200*l.* on account of the Messrs. Grigg, and that those

two sums were intended to be paid into court, in the cause of Trefusis *v.* Clinton, by or through the agency of Norway, for the purpose, as he, Jago, believed, of completing the purchase of the estate. So that Jago states a case which is inconsistent both with the terms of the agreement and the allegations of the bill. It was not intended, by the plaintiffs, that Norway should come to London with the bank notes in his hands. He first sent the money to his bankers at Truro; they drew a bill on their London house, and delivered it, to Jago, for Norway; and he remitted it to London. The money was entrusted to Norway, for the purpose of being realized in London. He committed no breach of trust, but did every thing that the parties intended. The understanding between them was, that Norway was to have the money forthcoming when it was wanted. The transaction would have been precisely the same, if no bill had been given; but the bankers at Truro had written to their bankers in London to honour Norway's draft for 1000*l.* In Burdett *v.* Willet,* the question related to goods, which may be ear-marked, but money cannot. As soon as the money became part of Norway's general balance, there was an end of the plaintiffs' case. The plaintiffs, if they have any remedy at all, have a remedy at law. They cannot fix Cocks & Co. with a trust; they knew nothing of the purpose for which the money is alleged to have been paid to Norway, and they received the amount of the bill before they had any notice of the plaintiffs' claim. Cocks & Co. were, indeed, agents; but every agent who receives a sum of money for another person, is not a trustee. There was no trust in Norway: as against him nothing but a debt existed: how then could a trust be created in the passage of the money through the hands of Praed & Co. and Cocks & Co.? Either Norway was guilty of a gross fraud, which was not proved, or he was a mere general debtor to the plaintiffs.

The delay that has taken place would alone prevent the plaintiffs from recovering in this case. They were aware of their alleged claim to this money a few days after Norway's death; but they did not file their bill until January, 1828.

The cases cited for the defendants, were Nicholson *v.* Knowles, 5 Madd. 47; Dixon *v.* Hamond, 2 Barn. & Ald. 310; Gosling *v.* Birnie, 7 Bingh. 339; Liebman *v.* Harcourt, 2 Mer. 513.

Mr. Tinney, in reply:

It has been said that there was no immediate appropriation of the 1700*l.*: it appears, however, by Jago's evidence, that that sum was received, for the Messrs. Grigg, for the specific purpose of being paid into court, by or through the agency of Norway. It could not be paid in the country; and, therefore, Norway procured bills from Praed & Co., and remitted one of them to London. Cocks & Co., being Norway's agents, ought to have applied the amount of the bill as *he* was bound to do.

It may be true that the bankers could not dispute Norway's title, but still they might be liable to the plaintiffs. Benson *v.* Whittam, 2 Sim. 493. So a tenant cannot dispute his landlord's title, or call upon him to interplead; but a third person may recover from the tenant.

The death of Norway makes a material difference in this case: for the death of a party is, in many respects, analogous to his bankruptcy. Such only of a bankrupt's property as was his, for his own benefit, is distri-

* See note to that case, 2 Vern. 638, Raithby's edition.

[Grigg *v.* Cocks.—4 Sim. 438.]

butable amongst his creditors. So an executor or administrator is not entitled to property which the testator or intestate did not take for his own benefit. In Burdett *v.* Willet the administratrix had recovered at law; but equity interposed to prevent her getting possession of the money. So, in Hassall *v.* Smithers, it was decided that the administratrix was not entitled to the bank notes and bills which had been remitted to the intestate for a specific purpose. In that case, the Master of the Rolls says that, if the intestate had been a bankrupt, property in his hands, under the same circumstances, would not have passed to his assignees, but would have been applicable to the purpose for which it was specifically remitted. No money ought to be paid to an executor or administrator which ought not to have been paid to the assignees of the deceased if he had become bankrupt.

In the general account kept by the bankers, there is no allusion to the two sums of 250*l.* and 200*l.*: they kept a distinct account as to those sums, and had no right to apply the 1000*l.* in satisfaction of them. If a person borrows 500*l.* of his banker, and gives security for it, and he afterwards pays in a sum of money, belonging to another person, can the bankers favour the parties who are liable upon the securities, and apply the money of the *cestui que trust* in satisfaction of the debt. If Cocks & Co. received the money as agents, they cannot protect themselves except by returning the money to the person who paid it: they cannot apply it to their own purposes. The bankers have not paid the whole 1000*l.* to Mrs. Norway; but they set up a claim to part of it: and they have still, in their names, the stock which was a security for part of the debt.

[The Vice-Chancellor:—Was there any agreement that the bankers should not apply the amount of the bill to pay the 250*l.* and 200*l.*]

There is no express evidence of such an agreement, but it is to be inferred from the mode in which the account was kept; nothing that was paid in to the general account, was applied to the 250*l.* or 200*l.* What right could the bankers have to alter their mode of dealing, so as to injure the plaintiffs. They had no right to vary the account, after they had received the notice from the plaintiffs; and they had no right to dispose of the money, without giving notice to the *cestui que trusts.* It makes no difference whether Norway did or did not state, to the bankers, the purpose for which he had received the amount of the bill, at the time when he paid it in, or whether they were informed of it afterwards, provided the notice was given before they parted with the proceeds.

The plaintiffs have been accused of delay in enforcing their claims; but Mrs. Norway did not prove her husband's will until 1827: and, a few days after Norway's death, application for the money was made, to the bankers: they still retained it, and no injury has been done to any one by the delay. With respect to the relief being at law; as the bill was payable to Norway or order, an action cannot be maintained by the plaintiffs; but the amount must be recovered through the name of the executrix, and, therefore, the plaintiffs must come into equity to make a claim against the trustees.

At all events the plaintiffs are entitled to the benefit of the securities for the debt, and to stand in the place of the party who has been paid. At Norway's death the bill was unpaid; and, therefore, the money was ear-marked.

The Vice-Chancellor:—The facts of this case, as they are to be col-

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lected from the pleadings and evidence in the cause, are as follows: [His Honour, after stating the facts of the case, proceeded thus:] I do not find any evidence or even allegation, in the bill, that the bankers were bound to keep the transaction as to the loan of the 250*l.* and 200*l.*, separate from Joseph Norway's general account, or that the bankers were precluded from repaying themselves those sums out of any moneys that might be afterwards paid to them on Norway's account. It might have been arranged that they should not repay themselves, without communicating with Norway; but nothing is stated in the bill relative to this part of the case, except that the notes were given, and the stock transferred as securities for the debt.

It appears that Patty Norway is the executrix of Joseph Norway, and that, after his death, the bill for 700*l.* was found in his pocket-book; and that, in consequence of a conversation that took place between her and Mr. Jago, the bill for 700*l.* was given up by her and returned to Praed & Co., and another bill was obtained for it, and the money secured thereby, was applied for the benefit of John Bennett. It is scarcely necessary for me to observe, that what took place upon that occasion could not affect the London bankers.

Mr. Collins's first letter was written on the 7th of October, 1825, and was answered on the 8th; and the bankers then state that Joseph Norway did not inform them that the bill was applicable to a specific purpose, and they add that no part of the balance could be drawn out, until the probate of Norway's will was left with them. So that here the bankers speak of the balance generally. Nothing that took place subsequently to the answer to Mr. Collins's letter, can affect the case between the parties. The question then is, whether, in the absence of any agreement to the contrary, the bankers had not, at the death of Norway, a right to repay themselves the 250*l.* and 200*l.* out of the proceeds of the bill for 1000*l.*, and to consider themselves as his debtors for the difference only. And my opinion is that, at the death of Norway, the bankers had a right to consider themselves debtors to him for the whole amount of the bill; and though they might, at the same time, have kept a separate account as to the 250*l.* and 200*l.*, yet, as there was no agreement binding them to keep those sums distinct from any other moneys that might be paid, to them, on Norway's account, they stood, at his death, in the situation merely of persons who were creditors of Norway, for the 250*l.* and 200*l.*, and debtors to him to the amount of the bill. The bankers, therefore, at the death of Norway, were entitled to consider themselves as debtors to him for the balance, and as not accountable to any other person. The consequence is that, as against the bankers, the bill must be dismissed, with costs.

With respect to Patty Norway, it appears that a suit was instituted, by her husband's creditors, against her, as executrix: and that she having admitted in the answer which she put in, in that suit, that the 513*l.* 7*s.* 3*d.*, being the balance of her late husband's account which she received from Cocks & Co., was in her hands, an order was made, in that suit, for her to pay that balance into court; and that she paid in the balance accordingly, before the bill in this cause was filed. But the right of the plaintiffs in this cause ought not to be prejudiced by that payment; and my opinion is that the plaintiffs are entitled to the balance of 513*l.* 7*s.* 3*d.*, but not in the shape of relief against Patty Norway. The bill, therefore, as against her, must be dismissed with costs; but I must declare

that that balance belongs to the plaintiffs in this cause, and must give them liberty to make such application respecting it, in the creditor's suit, as they may be advised.

Hunter *v.* Judd.*

4 Simons, 455.

Testator bequeathed his residuary estate to trustees, in trust, as to one third, for his daughter for life, and after her decease, in trust for her children, and to be paid to them on attaining twenty-five; but if his daughter should leave but one child her surviving, then the whole third to go to and become the property of such only child upon its attaining twenty-five, and be transmissible to its executors; but, in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over: Held, that the bequest to the children was void for remoteness.

August 6, 1833.

AFTER the decision upon the demurrer in Judd *v.* Judd, reported 3 Sim. 525, Mr. and Mrs. Judd, Mr. and Mrs. Haswell and Miss Lavinia Spiller, made a settlement of the testator's residuary property, for the benefit of themselves and their children, upon trusts, nearly similar to those declared by the testator's will. The plaintiffs were the trustees of that settlement, and they had been also appointed trustees of the will of John Spiller, in the place of the original trustees; and, not being satisfied with the decision on the demurrer, because the cases aftermentioned, and, particularly, Farmer *v.* Francis, had not been cited, they instituted this suit, for the purpose of having the question reconsidered, and the rights of the parties, under the will and settlement, ascertained and declared.

In 1831, Miss Lavinia Spiller died intestate and unmarried; and her sister, Mrs. Haswell, administered to her effects. Mr. and Mrs. Judd and their children, and Mr. and Mrs. Haswell and their children, were defendants in the suit.

Sir Edward Sugden and Mr. G. J. Turner, for the plaintiffs.

Mr. Knight and Mr. G. Richards, for the defendants, Mr. and Mrs. Judd, and Mr. and Mrs. Haswell.

Mr. Pepys and Mr. Shapter, for the children of Mr. and Mrs. Judd, submitted that the age of twenty-five, mentioned in the will, was the period for the *payment* of the portions, and not the time of *vesting*. Murray *v.* Addenbrook, 4 Russ. 407; Farmer *v.* Francis, 2 Sim. & Stu. 505; Ross *v.* Ross, 1 Jac. & Walk. 154; May *v.* Wood, 3 Bro. C. C. 471. They insisted on the close resemblance of the bequest to Mrs. Judd and and her children, to the limitations in Farmer *v.* Francis; and that the construction in favour of vesting, which ought to be put on that bequest, could not be affected by the gifts to Mrs. Haswell and Lavinia Spiller and their children, but that the clause containing the limitations to Mrs.

* *Ex relatione.*

Judd and her children, afforded the best clue to ascertain the testator's intention as to his two other daughters and their children, for it was the most favourable to vesting, which the law approved of, and it was first in order in the will, and therefore the testator must be presumed more fully to have developed his intention in that bequest, and he might be supposed to have satisfied himself with less precise language in the subsequent bequests.

The Vice-Chancellor:—None of the cases that have been cited appear to me to bear any resemblance to the present, because they are cases of *one single gift* only; whereas, in this case, it is manifest that the testator's meaning cannot be ascertained without taking into consideration the whole of his will.

In the provision for the children of Sarah Judd, the testator declares that, upon the death of his daughter Sarah, his trustees shall stand possessed of one-third of his residuary estate, in trust for the child or children of the body of his said daughter Sarah, lawfully begotten, if more than one, share and share alike, according to the nature and quality thereof, and to be paid, assigned and transferred to them, by his trustees, upon their severally and respectively attaining the age of twenty-five years. If that had been all, nothing could have been more plain than that this was a gift independently of the time of payment. But the subsequent clauses prevent the rights of the children from being determined by that clause alone.

In the next clause the testator declares that, in case his said daughter Sarah should leave but one child her surviving, then the whole of such one-third part or share of the residue of his real and personal estate and effects, should go to, and become the property of such only child upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors or administrators. Now the testator could not intend that, if there were several children, they should take vested interests whether they survived their mother or not, but, if there were but one child who should survive, then that such child should only take on attaining the age of twenty-five years; and, yet, in the first clause, nothing is said about the children surviving the parent, whilst it is declared that, if she leaves but one child, the whole of that one-third shall go to that child upon attaining the age of twenty-five years.

I must here dissent from the argument that the word "property," was not used in its correct sense; for I consider that, when the testator declared that if Sarah should leave but one child, then the one-third should go to and become the property of that child, upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors, or administrators, he, in order that there might be no doubt as to his intention, expressed himself, by way of pleonasm, to mean that the third should become the property of the child at that time, and, at that time, should become transmissible to its representatives.

The testator then gave the property over, to the other branches of his family, in case his said daughter should leave no child of her body her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years; by which, it is clear that the effect of the first clause is controlled.

On the decease of Mrs. Haswell, her third part or share is given to her child or children, if more than one, share and share alike, upon

[Hunter *v.* Judd.—4 Sim. 455.]

their severally and respectively attaining the age of twenty-five years; and, if she should leave but one child her surviving who should attain the age of twenty-five years, then the whole of such one-third part or share of his residuary estate and effects, is to go to such survivor, his or her executors or administrators: but, in case there should be no such child of her body who should attain the age of twenty-five years, then the said one-third part or share of his said residuary estate is to go and accrue to the survivors or survivor of his daughters, Sarah and Lavinia. Nothing is here said, in the limitation over, about Mrs. Haswell *leaving* children (as was done with respect to the Judds); but it is a gift over in case there should be no child who should attain the age of twenty-five years, without making the circumstance of the child surviving the mother a term in the gift over. However, it is clear that the testator intended that Mrs. Haswell's children should be entitled only in case they survived her; for, in the latter part of the will, he gives, to such husband as should survive any of his daughters, an annuity of 200*l.*, and directs that, in case such daughter should leave no child her surviving, then the annuity should be paid, out of the general residue of his real and personal estates; but, in case such daughter should leave a child or children her surviving, then the said annuity of 200*l.* should be paid out of the one-third part or share of the residue of his real and personal estates, so given and bequeathed as aforesaid to the children or child of that daughter. Now suppose that Mrs. Haswell had had a child who did attain the age of twenty-five years, and died in her lifetime, if the construction is that, by virtue of the clause as it stands in the gift to the children, the child, by reason of attaining twenty-five, takes a vested interest, what is to be done with the annuity to the husband? According to the terms there used, the husband's annuity was to be taken out of the child's one-third, only in the event of the child surviving the daughter; but, if the child died in the lifetime of the daughter after attaining twenty-five, and had a vested interest, then the 200*l.* must come out of the residue generally; and it would operate upon the other two-thirds, and not upon the one-third of that child only. It is, therefore, perfectly clear that the testator has so framed his will, that you cannot construe one part without looking at the other.

Then, when we come to the gift of the share to the children after the death of the daughter Lavinia, the testator expresses it to be his will and desire that the trustees should stand possessed of the said one-third part or share "in trust for the children of the body of his said daughter Lavinia, lawfully to be begotten, if more than one, share and share alike, upon their severally and respectively attaining the age of twenty-five years; and, if she should leave but one such child her surviving, who should attain the age of twenty-five years, then the same to go to such only child, upon his or her attaining the age of twenty-five years, and be an interest transmissible to his or her heirs, executors, or administrators; and, in case his said daughter Lavinia should have no child of her body lawfully begotten, who should attain the age of twenty-five years, then the said one-third part or share of the said residue of his real and personal estate and effects, should go and accrue to the survivors or survivor of them, his said daughters Sarah and Mary Caroline." Now here the language differs from the language in which the gift over is made with respect to the share of Mrs. Judd: and then the testator declares that in default of issue of his three children who should attain twenty-five, his

trustees should stand seised and possessed of the said residue of his real and personal estate and effects, in trust for his real and personal representatives. I cannot, therefore, but think that the testator has made it perfectly manifest that he intended no child to take absolutely, except in the event of its attaining the age of twenty-five years, and also surviving its mother.

The clause concerning maintenance is exceedingly inaccurate, and almost unintelligible; but it seems to afford additional ground for inferring that the testator intended that no child should take a vested interest in any portion of the fund, before it attained the age of twenty-five years.

This, therefore, not being the case of a single gift, but being accompanied with all that collateral matter which must be looked at to ascertain what is the correct meaning, I am of opinion that these children do not take vested interests before they attain the age of twenty-five years.

Therefore declare that the limitations in the testator's will in favour of the children are invalid.

Tomlinson *v.* Booth.

4 *Simons*, 461.

A DEFENDANT who had pleaded moduses to a bill for tithes filed by the rector's lessee, was ordered, on motion, to produce all the documents in his possession, which had belonged to a former lessee of the rectory, and also all the other documents in his custody relating to the matters in dispute, except those which tended to show the existence of the moduses.

June 3, 1831.

Tomlinson *v.* Lymer.

4 *Simons*, 467.

A MODUS of three halfpence, payable by every occupier of land in the parish, for every cow kept by him within the parish, in lieu of the tithes of the milk and calves of such cow, is good.

The evidence of a witness in support of a modus for milk and calves is receivable, notwithstanding he occupies a cottage and garden in the parish.

An owner of lands in the parish is a good witness to prove the custody of old receipts for moduses alleged to be payable for his lands, notwithstanding he has agreed to contribute to the costs of the suit.

Old receipts for tithes and moduses expressed merely to have been given to A. for sums received of him by B. on account of C. sufficiently

appear to relate to the parish, it having been proved that persons of those names were respectively, at the dates of the receipts, owners of lands in the parish, and curate and rector thereof: and such receipts having been found by A. amongst his late father's papers, under whom he claimed, are admissible in evidence to prove the moduses.

July 25, 27, 29, 1831.

Nail *v.* Punter.

4 *Simons*, 474.

Leave given to file a supplemental answer for the purpose of stating facts which the defendant had wished to state in his original answer, but had been prevailed upon to omit, by the mistaken advice of his solicitor.

June 3, 1831.

THE original bill was filed by Ann Nail, the wife of William Nail, against her husband, who was a bankrupt, Messrs. Punter & Ward, the trustees of her marriage settlement, and Messrs. Hole & Harber the assignees of William Nail, for the purpose of making the trustees answerable for a breach of trust, in selling out stock which was settled to Mrs. Nail's separate use. Pending the suit Mrs. Nail died, having, by her will, appointed the stock to her husband, and made him her executor; upon which he filed a bill of revivor and supplement, against the trustees and his assignees. The trustees having put in their answer in the supplemental clause, in which certain facts were omitted, now made a motion for leave to file a supplemental answer.

The affidavit made by the defendants in support of their motion, was to the following effect.

Previous to the marriage, it was agreed that 200*l.* stock, part of a sum of 1600*l.* stock, to which Mrs. Nail was entitled, should be sold, and the produce advanced to Mr. Nail, on the security of certain leasehold property, and of his warrant of attorney, and that 1400*l.* the residue of the stock, should be transferred to the defendants Ward & Punter, in trust for Mrs. Nail's separate use, during her life, with a general power to her to dispose of the capital by deed or will, and that the sum to be advanced to Mr. Nail, should be settled in like manner. Accordingly, the 200*l.* was sold out, and the produce, amounting to 158*l.*, advanced to Mr. Nail. He executed the securities to Ward & Punter, and the 1400*l.* stock was transferred into their names upon the trusts agreed upon, and which were declared by an indenture of the 31st January, 1818. After the marriage, the trustees, at the request of Mr. and Mrs. Nail, sold out, at different times, the whole of the 1400*l.* stock, and, to secure the produce, amounting to 1200*l.*, Mr. Nail gave the trustees another warrant of attorney, and signed an agreement dated the 19th of August, 1819, by way of equitable mortgage to them, of some leasehold houses, but which proved to be an utterly insufficient security. In November, 1822, the trustees took Mr. Nail's goods in execution, under the first warrant of attorney, but Mrs. Nail afterwards obtained possession of them. In March, 1823,

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Mr. Nail became bankrupt, and Messrs. Hole & Harber were chosen his assignees, but he never obtained his certificate.

In March, 1825, Mrs. Nail filed the original bill, praying that the trustees might be decreed to transfer the 1400*l.* stock into court, and to account for the dividends thereon and for the moneys levied under the execution, and that new trustees might be appointed; and, if the moneys so levied were insufficient to pay the 158*l.* that Ward & Punter might transfer the mortgage securities for the same to the new trustees. Messrs. Jones & Bland (the solicitors who prepared the second warrant of attorney, and were in possession of the agreement for the second mortgage) were employed, by Ward & Punter to defend the suit for them; and, accordingly, they caused an answer to be prepared, in which the defendants stated that they had sold out the 1400*l.* stock at Mrs. Nail's request, and paid the produce for or on account of her and her husband, in compliance with the directions of Mrs. Nail herself; but the answer did not mention the securities which the defendants had taken for the same, and the defendants imputed that omission to their solicitors. In June, 1828, the cause was heard, and a decree was made according to the prayer of the bill. The defendants afterwards transferred 700*l.*, in part of the 1400*l.* stock, into court, and time was given them to transfer the remainder.

Mrs. Nail, by her will dated in July, 1829, gave the 1400*l.* stock to her husband, and appointed him her executor. He proved the will in December, 1830, and then filed the bill of revivor and supplement, claiming to be entitled to the 1400*l.* for his own benefit.

After it was known that Mrs. Nail had appointed the 1400*l.* stock to her husband, the trustees were informed, by Mr. Jones, that they would be relieved from the payment of the remainder of that sum, as Nail had himself had the benefit of the sale of the whole. In February, 1831, Mr. Bland sent, to the trustees, to put in their answer to the bill of revivor and supplement, which he had got engrossed without consulting or receiving any instructions from them; and, the engrossment having been read over to them, they objected thereto, on the ground that they thereby submitted that the 1400*l.* was the property of Nail's assignees, instead of stating the real case, and their rights, according to Mr. Jones's advice; but Mr. Bland informed them that the answer was a mere matter of form, and must be put in as drawn, and urged them to swear it on that day, in order to prevent an attachment. The answer was the joint answer of the trustees and the assignees, though those parties had answered separately in the original suit; and the trustees swore it as prepared. They afterwards discovered that, though they and the assignees had answered separately in the original suit, one counsel only appeared both for them and the assignees, and that Jones & Bland were the solicitors of the assignees, and were creditors of the bankrupt to a large amount, and had, throughout the suit, acted collusively with the bankrupt's solicitor, in order to deprive the defendants of their defence against the bankrupt and his assignees, and that the 1400*l.* might be distributed under the commission: and Bland had lately delivered to the defendants a copy of a writ of execution of an order in the cause, dated the 12th of March, 1831, whereby the defendants were ordered to transfer the remaining 700*l.* stock, to the accountant-general, within a week after service.

The solicitor for the plaintiffs in the original and revived suits, deposed that he carried in a charge under the decree, against Punter & Ward, in

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respect of the dividends of the stock, and the produce of Nail's goods sold under the execution; that Punter & Ward carried in their discharge, and that all the sums mentioned in it, which the Master allowed, appeared to have been paid after the 19th August, 1819, the date of the agreement for the mortgage, and before the 23d of January, 1824: that no mention was made, in the progress of the cause, of the securities for the 1200*l.*, and that he had no knowledge of any such securities existing: he denied collusion with Jones & Bland, and added that Punter & Ward had not proved any debt under the commission, though the agreement for securing the 1200*l.* was dated as before-mentioned, and the commission did not issue till March, 1823, therefore he concluded that, at the latter period, no debt existed from Nail to Punter & Ward, and especially as he had, in his possession, a receipt from them to Nail, dated 1st January, 1823, for 1511*l.* "for bricks, timber, &c., and for the further sum of 60*l.* settled up to that day."

Mr. Nail and two other persons deposed to a conversation that took place between Nail, his assignees, and the defendant, Punter, on the 6th of May, 1831, in the course of which the assignees said that Nail was entitled to the whole of the trust-money, and that they would do any thing to serve him; and then Punter said that he had been making a fresh affidavit, to which Nail replied: "More rogue you, for you have forsworn yourself;" upon which Punter said, "Yes, we have, all through the piece, but it was through Bland's advice;" and added, "We will sign the houses over to you, any day, if your attorneys will give us an undertaking to free us from the assignees; or, if you will pay your own attorneys' expenses, we will settle with you at any time."

Mr. Bland deposed that he and his partner undertook to defend the suit for both Punter & Ward and the assignees, the latter being, in their judgment, merely nominal parties: that, accordingly, they read over and explained the original bill, to Punter & Ward, and took their instructions, in writing, for their answer, and afterwards laid them before counsel, who, without instructions from them, but thinking it advisable in his own judgment, prepared separate answers for Ward & Punter, and for the assignees, and, with a full knowledge of all the circumstances of the case, wrote an opinion, at the foot of the draft of Punter and Ward's answer, stating that they had been guilty of a gross breach of trust, and would have to replace the whole stock, and to pay the costs of the suit; that the opinion was read over to them; and, in consequence of it, and to save expense to Punter & Ward, it was arranged between them and their solicitors that the counsel who prepared the answers should be concerned for all the defendants: that the deponent and his partner had, throughout the suit, conducted the defence of Punter & Ward according to the best of their skill and judgment, under the advice of counsel, and had attended to their interest as separately and individually as if they had been concerned for no other parties; and that, until within a few days, Punter & Ward had always expressed themselves satisfied with their conduct in the suit: that, after Mrs. Nail's death, Punter & Ward called on the deponent, and asked whether they would not be released from paying the remainder of the stock into court, and that the deponent distinctly informed them that Nail, being an uncertificated bankrupt, the property would pass to his assignees, but that they might prove their demand against him under his commission: that, on the bill of revivor and supplement being filed, the deponent again apprised Punter & Ward that, at all events, they

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must be ready to pay the money into court; and that counsel should be properly instructed as to their defence, and consulted as to their being relieved from paying the residue of the money: that, thereupon, the deponent had a conference with the counsel, who stated that the money must be paid in, and would pass to Nail's assignees, and that no part could be retained, by Punter & Ward, to satisfy any debt due to them, from Nail, before his bankruptcy, and that he thought one answer would be best: that the counsel, accordingly, and without any direction from the deponent, prepared one answer for all the defendants, and the same was read over and explained to Punter & Ward, and they were apprised of the counsel's opinion before they signed it. The deponent denied the fraud and collusion imputed to him by Punter & Ward's affidavit; and added that, as soon as he learnt that they were dissatisfied with him, he advised them to employ another solicitor, and to take the opinion of another counsel, which they accordingly did, having been previously furnished, by the deponent, with the papers in the suit.

The defendants Punter & Ward now moved for leave to file a supplemental answer to the bill of revivor and supplement, in order to state, in bar to the relief prayed thereby, that Nail, before his bankruptcy, received or had the benefit of the produce of the stock, and gave to them the securities before-mentioned for the same; and that the order of the 12th of March, 1831, might be discharged, or that the defendants might have, till the day after the hearing of the supplemental cause, to transfer the 700*l.* into court.

Mr. Pepys and Mr. Chandless in support of the motion, said that it was most material to the justice of the case, that the additional facts should be stated; that the defendants had objected to swear the answer without those facts being contained in it; but that their solicitors, who acted also for the assignees, and were to benefit by the money when paid in, had told them that they must swear the answer as it was drawn.

Mr. Knight and Mr. Barber, for Mr. Nail:

The parties who make this motion have disobeyed the order of the 12th of March, 1831, and, though process of contempt has not issued, they are for all purposes in contempt.

[The Vice-Chancellor:—Notwithstanding that, I shall hear the motion.]

Mr. Nail is the plaintiff in the supplemental suit as his wife's personal representative. He has nothing to do with what has taken place between Jones & Bland and Ward & Punter. The question is whether reasonable diligence has been used, and whether these defendants knew of the facts in question, when they put in their answer. There is no case in which the court has allowed a supplemental answer to be filed by a party who knew the facts, but omitted to state them. No defence which was not available in the original suit, except questioning the derivative title, can be made in the supplemental suit. The decree in the original suit has decided that the money ought to be brought into court. The defence which the parties propose to make, cannot be made in an answer to a bill of revivor and supplement, but only by filing a cross bill against Nail and his assignees. It is personal to the plaintiff; and the court cannot make a decree in the supplemental cause, upon an equity which is personal to the plaintiff. The rights are distinct: and this case is similar to the common case of an executor who files a bill, and is met by a claim of set-off on a demand that is personal to himself.

[Troward *v.* Bingham.—4 Sim. 483.]

Besides, the whole defence is open to these defendants, upon the record as it now stands. The answer to the original bill distinctly alleges that the stock was sold out, and the produce disposed of for the benefit of Mr. and Mrs. Nail, in compliance with the directions of Mrs. Nail herself.

[The Vice-Chancellor:—That answer puts the matter in issue, as between the defendants and the married woman.]

The debt accrued in the lifetime of Mrs. Nail. Time began to run against it, from 1819. How has it been kept alive? It has never been proved under the commission; but all Nail's estate has been assigned to his assignees; and the question is, whether they take it subject to a lien? How can the court fix the fund which has vested in the assignees, with a supposed lien or set-off?

Amongst all these affidavits, it is not once sworn that the money is due; but it has been sworn that, in 1823, Nail gave these defendants a receipt for a larger sum of money.

Mr. Treslove and Mr. Girdlestone, Sen., appeared for Nail's assignees.

The Vice-Chancellor:—In this stage of the proceedings, I am not able to say that, at all events, the defendants cannot derive any benefit from stating, in their answer, the facts which they now seek to introduce into it. As the omission has arisen from mistake, it seems to me to be consistent with justice to allow them to add such matter as may, at the hearing, have the effect of inducing the court not to order the fund to be transferred to the plaintiff. Whether it is necessary for them to file a cross bill, is another question. I shall therefore give the defendants a month from the present time to file a supplemental answer, for the purpose of stating the facts mentioned in the notice of motion; and all proceedings under the order of the 12th of March, 1831, must be stayed in the mean time.

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4 *Simons*, 483.

Executor of a deceased plaintiff filed a bill of revivor, but did not obtain an order to revive. Motion, by defendant, that the executor might revive within a given time, or both bills be dismissed, with costs to be paid by the executor. Motion granted as to the bill of revivor only.

June 22, 1831.

THE plaintiff having died, his executor filed a bill of revivor, but did not obtain an order to revive. Mr. Jacob, for the defendant to the original bill, now moved that the suit might be revived, by the plaintiff, in the bill of revivor, within a given time, or that the original bill and the bill of revivor might be dismissed, with costs to be paid by the plaintiff in the bill of revivor. Bolton *v.* Bolton, 2 Sim. & Stu. 371.

Mr. Lovat opposed the motion.

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The Vice-Chancellor:—The filing of a bill of revivor, is not an adoption of the original suit, unless an order of revivor be obtained. The executor has a *locus pœnitentiæ*. Having filed a bill of revivor, he then pauses; and, if he does not adopt the original suit, he is not liable to the costs of it.

Order that, if the executor do not procure an order to revive, within a given time, the bill of revivor be dismissed with costs.

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4 *Simons*, 485.

An act of parliament reciting a will by which estates were devised to A. for life, remainder to his first and other sons in tail, remainder to B. in tail, and that B. had suffered a recovery to the use of A. in fee; directed the estates to be sold, and other estates to be purchased and conveyed to such of the uses of the will as, at the time of the sale, should be existing, undetermined, and capable of taking effect.

The estates were sold, and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, &c. Held, that B. did not take an estate tail in the purchased estates.

July 21, 1831.

ELISHA BISCOE, Esq., by his will, dated the 7th of November, 1772, devised all his estates to his son, Elisha Biscoe, for life, with remainder to trustees to preserve contingent remainders, with remainders to the first and other sons of his said son, successively, in tail male, with remainder to the only daughter, and, if there should be more than one, to all the daughters of his said son, charged with the payment of 2000*l.* a-piece to each of the testator's own daughters. And, in case of the death of the testator's said son without issue, he gave and devised all his estates, chargeable as aforesaid, unto the first and other sons which he, the testator, might thereafter have, in tail male, in succession, with remainder to the testator's daughters as tenants in common in tail, with divers remainders over, with the ultimate remainder to the testator's own right heirs. The testator died on the 28th of January, 1776, leaving his son, Elisha Biscoe, and Ann Biscoe, and Catherine Frances Biscoe, his two daughters, his only children him surviving. Ann Biscoe married Timothy Hare Earle, and Catherine Frances Biscoe married Edmund Rolfe the younger.

By indentures of lease and release, of the 4th and 5th of February, 1789, and the 11th and 12th of June, 1793, to which Elisha Biscoe the son, was a party, and which recited the will, and were expressed to be made for the purpose of barring the estates tail of Mrs. Earle and Mrs. Rolfe, in the devised premises, and all other estates tail, remainders and reversions expectant upon the death and failure of issue of Elisha Biscoe, the son, and for settling the premises to the uses thereafter expressed, and by common recoveries suffered in Hilary term 1789 and Trinity term 1793, in which the daughters and their husbands were vouched, and vouched over the common vouchee, the testator's estates were limited to the use of Elisha Biscoe, the son, his heirs and assigns for ever.

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By an act of parliament passed in the thirty-fourth year of Geo. III., intituled: "An act for empowering trustees to convey, to Sir Joseph Banks, Bart., a part of the settled estates of Elisha Biscoe, Esq., pursuant to his contract for the purchase thereof, and to sell or exchange other parts of the said settled estates, and to lay out the money, arising from the sales, in the purchase of other lands, to be settled, as well as those taken in exchange, to the uses of the estates that shall be so sold or exchanged," after reciting the will and death of the testator, the indentures of February, 1789, and June, 1793, the suffering of the recoveries, and that by an indenture of the 30th of July, 1791, Elisha Biscoe, the son, had demised, to Sir Joseph Banks, a messuage and lands, at Smallbury Green in the county of Middlesex, part of the devised estates, for twenty-one years, at the rent of 200*l.*; and that it was thereby agreed that, as soon as Elisha Biscoe should be enabled to make out a good title to the fee simple of the demised premises, it should be lawful for Sir Joseph Banks to become the purchaser thereof for 6000*l.*, and further reciting that Elisha Biscoe, the son, was then unmarried, and had not any issue, and that the several limitations created by the will and expectant on the failure of issue of Ann Earl and Catherine Frances Rolf, had been barred and destroyed by the recoveries which Timothy Hare Earl, and Ann his wife, and Edmund Rolfe, the younger, and Catherine Frances his wife, were thereinbefore mentioned to have respectively suffered, and that the said Elisha Biscoe, the son, was then seised of the remainder, or reversion thereof, in fee simple, expectant on the failure of issue of his body; and that it would be greatly for the benefit of Elisha Biscoe, the son, and his issue inheritable under the will, if the contract with Sir Joseph Banks were fulfilled, and proper trustees were appointed to convey the premises at Smallbury Green to him, and also to sell or exchange the remaining part of the devised estates, and to lay out the moneys that should arise by such sale in the purchase of other lands, to be settled, as well as those which should be taken in exchange, to such of the uses created by the will, *as were then existing, undetermined, or capable of taking effect:* it was enacted that it should be lawful for Edmund Calamy and James Wortham, (the trustess for effecting the purposes of the act) upon payment to them of the 6000*l.*, to convey the premises at Smallbury Green to Sir Joseph Banks in fee; and also, with such consent as therein mentioned, to sell, or to convey in exchange for other hereditaments, all such of the devised estates as were described in the schedule to the act: and that Sir Joseph Banks and the persons to whom Calamy and Wortham should, in pursuance of the act, make any sale, conveyance or exchange, should, immediately after the payment of their respective purchase-money, or the money to be paid on any such exchange, and the execution and delivery of the conveyance of the hereditaments by him or them purchased or conveyed in exchange, have, hold and enjoy all the hereditaments to be by him or them respectively purchased or had in exchange, (except the payment of the aforesaid sum of 2000*l.* a-piece to Mrs. Earle and Mrs. Rolfe,) freed and discharged of and from all the uses, trusts, estates, limitations, charges, powers, provisoes and declarations contained in the will concerning the same hereditaments: and that Calamy and Wortham should stand possessed of the moneys, which should arise by such sales or exchanges, upon trust, in the first place, to defray the expenses of obtaining the act and carrying the trusts thereof into execution; and, in the next place, with such consent as aforesaid,

to lay out the residue or surplus of the moneys to arise by such sales or exchanges, in the purchase of freehold hereditaments in fee simple in possession, or of customary, copyhold or leasehold lands, and to convey, surrender and assign, or cause to be conveyed, surrendered and assigned, the lands and other her editaments so to be purchased, to such of the uses, upon and for such of the trusts, intents and purposes, and with, under and subject to such of the powers, provisoes, declarations and agreements, in and by the said recited will of the said Elisha Biscoe deceased, particularly or by reference limited, declared, contained or mentioned of and concerning the messuages, lands and hereditaments thereby respectively devised or intended so to be, and by the said act authorized to be sold or exchanged, as then were, or, at the time of making such sale or sales, exchange or exchanges, assurance or assurances, *should be existing, undetermined or capable of taking effect*, or as near thereto as the nature and qualities of the estates so to be purchased or had in exchange, would then admit of: and it was further enacted that, until such sales, conveyances, exchanges and assurances should be made and executed, the said hereditaments, or so much of them as should not be sold or exchanged, should be held and enjoyed, and the rents and profits thereof received by and for the benefit of the persons who would have been entitled to receive the same in case the act had not passed.

The act contained a saving clause to the following effect: "Saving to his majesty, his heirs and successors, and the said Timothy Hare Earle, and Ann his wife, and the said Edmund Rolfe, the younger, and Catharine Frances, his wife, in respect of the aforesaid sums of 2000*l.*, and 2000*l.* only, and all and every person or persons, bodies politic or corporate, his, her or their respective heirs, successors, executors and administrators (other than and except the said Elisha Biscoe, the son, and his heirs, and the heirs of the body of the said Elisha Biscoe the son), all such estates, rights, titles, claims and demands whatsoever, of, in, to or out of the messuages, lands and hereditaments hereby authorized to be sold or exchanged as aforesaid, or any part or parts thereof, as they, or any of them had before the passing of this act, or could or might have had or enjoyed in case the same had not been made."

The sums of 2000*l.* were afterwards paid, and ceased to be a charge on any part of the estates.

Several parts of the devised estates were sold, under the act of parliament: and, a short time previous to 1817, Wortham, who had survived his co-trustee, contracted to purchase, with part of the moneys arising from the sales, a freehold estate in Berkshire, called the Titcombe estate: and, by indentures of lease and release of the 26th and 27th of March, 1817, and made between James Payn, Elisha Biscoe the son, Wortham and several other persons, after reciting the will of the testator, the indentures of the 4th and 5th of February, 1789, and of the 11th and 12th of June, 1793, the common recoveries, and the act of parliament, and that several of the hereditaments directed to be sold by the act, had been sold, and that the hereditaments therein expressed to be thereby released, were contracted to be sold to Wortham, as surviving trustee under the act: in consideration of 16,284*l.* paid by Wortham, the Titcombe estate was conveyed to him, his heirs and assigns, to hold the same to him and his heirs, *to such of the uses, and upon and for such of the trusts, intents and purposes, and with, under and subject to such of the powers, provisoes and declarations, in and by the will of*

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the said testator, limited, declared, contained or mentioned of and concerning the messuages, lands and hereditaments thereby devised, and by the act of parliament authorized to be sold or exchanged, *as were then existing, undetermined and capable of taking effect.*

Elisha Biscoe, the son, by his will dated the 26th of May, 1824, devised all his real estates to Wortham and Thomas Bramall and their heirs, in trust to sell.

Shortly afterwards, Elisha Biscoe, the son, died without issue; and, on the 13th of October, 1830, Wortham and Bramall, in execution of the trusts of his will, agreed to sell the Titcombe estate, to the defendant, Colonel Mackinnon. The conveyancer who advised on the title for the defendant, objected thereto, on the ground that the uses limited by the will of Elisha Biscoe, the father, became restored, on the execution of the deeds of March, 1817, as to the estates and lands comprised therein, so far as regarded the estates given, by the will, to the testator's daughters. Colonel Mackinnon, accordingly, refused to complete his purchase: in consequence of which the bill in this cause was filed to compel him to perform the agreement.

It was arranged, between the parties, that the opinion of the court should be taken upon the objection, and that, with that view, a motion should be made, by the plaintiff, that Colonel Mackinnon might be ordered to pay his purchase-money into court; and a motion to that effect was now made by

Mr. Knight and Mr. Jas. Russell, for the plaintiff:

Elisha Biscoe, the son, was, under the will of his father, seised of the devised estates, for his life, and entitled to the reversion in fee, subject to the contingency of his having issue, and to the estates tail vested in the testator's daughters, and the subsequent remainders. By the recoveries suffered by the daughters and their husbands, in 1789 and 1793, the estates tail, and all the subsequent remainders, were destroyed, and Elisha Biscoe, the son, became seised in fee, subject to the contingency of his having issue. It is said that the words "existing, undetermined or capable of taking effect," which occur in that part of the act of parliament which directs the uses to which the estates to be purchased are to be conveyed, must be construed so as to exclude those uses only which should have *naturally* expired or become incapable of taking effect, and that the estates tail given to the daughters, not having so expired or become incapable of taking effect, the direction in question had the effect of restoring those estates tail. But, having regard to the recitals of the act, it clearly appears that those words of direction did not include the estates tail which the daughters had, and which were barred by the recoveries. Consequently, the Titcombe estate having been conveyed, to Wortham, in the words of direction used in the act, and Elisha Biscoe being dead without issue, the objection to the title is unfounded.

Mr. Pepys and Mr. Barber for the defendant:

The words of the act of parliament, which direct the uses to which the purchased estates are to be conveyed, have clothed the new estates with the uses of the will. Those words must be taken in their usual, technical sense. They contain no reference to the recoveries, or to any change of interest that might take place, except by the natural expiration

or failure of the estates created by the will. They are the strongest and most appropriate words that could have been used by a person who wished to revive the uses of the will. If there had been any restrictive words, such as, "save and except so far as such uses, trusts, &c. are defeated or destroyed by the said recoveries," all doubt would have been removed; but no such words are used in this act of parliament or in the conveyance to Wortham. We contend, therefore, that the estates tail given by the will to the daughters, are restored, and consequently, that the title is bad. It is, however, sufficient for the purchaser to show that the question is a very doubtful one.

The Vice-Chancellor:—As the parties wish to take my opinion upon this case, I will certainly give it.

The act recites the recoveries to have been suffered, and that the several limitations created by the will, and expectant on failure of issue of the daughters, had been barred and destroyed, by the recoveries which Timothy Hare Earle and Ann his wife, and Edmund Rolfe, the younger, and Catherine Frances, his wife, had suffered, and that Elisha Biscoe, the son, was then seised of the remainder or reversion of the estates, in fee simple, expectant on the failure of issue of his body. The act next recites that it would be greatly for the benefit of Elisha Biscoe, the son, and his issue, &c., but it takes no notice of any future taker. The act then proceeds, upon the application of Elisha Biscoe the son, to vest the estates in the trustees, for the purpose of completing the contract with Sir Joseph Banks, and of selling or exchanging the remainder of the estates, and then it directs that the surplus of the proceeds of the sales to be made under the act, shall be invested in the purchase of lands to be settled to such of the uses limited and declared by the will of Elisha Biscoe, the father, of and concerning the messuages, &c. thereby devised and by the act authorized to be sold, "as are now, or at the time of making such sale or sales, shall be existing, undetermined or capable of taking effect." Now, without going further, it is quite clear that the act never could have intended that the estates tail in the daughters, which had been barred by the recoveries, should be revived, as to the newly purchased lands.

But, in addition of those parts of the act which I have already stated, it is further manifest that such was not the intention of the legislature, from the clause which provides that, until the sales should be made, the trustees should permit the hereditaments, or so much of them as had not been sold or exchanged, to be held and enjoyed, and the rents and profits thereof to be received and taken, by and for the benefit of the person or persons who would have been entitled to, and ought to have and receive the same in case the act had not been made. That clause, therefore, would continue only to Elisha Biscoe, the son, and his issue, if he had any, and his heirs and assigns, the right to receive the rents and profits of the estates not sold. One cannot but suppose that it was intended that the right to receive the rents and profits of the lands remaining unsold, should be precisely commensurate, and be exactly corresponding with the right to take the rents of the new estates. The act then points out the parties who were to take the rents and profits of the lands which were to be purchased with the proceeds of the estates that were to be sold. The saving clause is in the following words, &c. &c. &c. It is quite clear therefore that the saving clause points out only such rights as the daugh-

[Wortham *v.* Mackinnon.—4 Sim. 485.]

ters had in the sums provided for them by the testator's will, and such rights as the son and his issue inheritable under the will might have. There can be no doubt, therefore, that the estates vested in the parties who suffered the recoveries, were intended to be absolutely barred.

Then supposing that to be meaning of the act, about which I think there cannot be any reasonable doubt, the question is, whether the words of the act have carried that intention into effect. More appropriate words might, I think, have been used for the purpose of expressing the intention of the parties. The words are: "To such of the uses declared by the will, as now are, or, at the time of making such sale or sales, may be existing undetermined or capable of taking effect." And then it is said that, by those words, the estates tail which had been destroyed by the recoveries, were revived. But, if the daughters had actually destroyed their estates tail, the use, which was commensurate with those estates tail, did not exist. The words "shall be existing, undetermined or capable of taking effect," do not point, merely, to changes by death or failure of issue, but include such changes as might be produced by those events and by the acts of the parties. And it would be strange to put such a construction on the general words, "as shall be existing," &c., as to exclude the acts of the parties, which very acts are noticed upon the face of the act of parliament. Although a more happy choice of expressions might have been made, yet the words that are used are, in my opinion, quite sufficient to exclude the daughters from any estate tail in the lands to be purchased.

I have further to observe that it appears to me that, under the will of the testator, the daughters never took any estate tail; for the estates are given over on the general failure of issue of the grandsons; the will, however, contains no limitation which includes their issue female.

His Honour made an order in the terms of the notice of motion, with liberty to the purchaser to have a case stated for the opinion of a court of law.*

* The purchaser did not take a case for the opinion of a court of law, but moved, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged, and that an order might be made pursuant to the original notice of motion.

On the 20th December, 1831, his lordship, after expressing considerable doubt upon the principal question, directed a case to be stated for the opinion of the judges of the Court of Common Pleas. The case was argued on the 2d May, 1832, and the judges certified that they were of opinion that Wortham and Bramall took an estate in fee, in the lands and hereditaments conveyed by the indentures of March, 1817. 8 Bing. 564.

Turner *v.* Turner.

4 *Simons*, 497.

Where a defendant, who is the only defendant, absconds, the bill cannot be taken *pro confesso* against him under 11 Geo. 4. & 1 Will. 4. c. 36, on motion, but the cause must be set down for hearing.

July 26, 1831.

IN this case there was one defendant only; and he having absconded, proceedings were taken, under 11 Geo. 4. and 1 Will. 4. c. 36, s. 3, for taking the bill *pro confesso* against him; and the bill was afterwards ordered to be taken *pro confesso*, on motion.

On a subsequent day, Mr. Sharpe, the plaintiff's counsel, stated that some doubt was entertained whether, when a defendant, who is the only defendant, has absconded and is not brought up in custody, the cause ought not to be set down for hearing for the purpose of having the bill taken *pro confesso*.

The Vice-Chancellor, after consulting with the registrar, said that, in cases like the present, the order for taking a bill *pro confesso*, could not be obtained upon motion, but that the bill ought to be set down for hearing, and the order be then made. (See next case.)

Baker *v.* Keen.

4 *Simons*, 498.

Course of proceeding to take a bill *pro confesso* under 11 Geo. 4. & 1 Will. 4. c. 36, against a sole defendant, who has absconded.

March 27, 1833.

THIS was a foreclosure suit. The defendant, who was the only defendant, had absconded and gone beyond the seas. The course of proceeding for taking the bill *pro confesso* against him, under 11 Geo. 4. and 1 Will. 4. c. 36, was as follows:

The bill was filed on the 29th October, 1832. On the 24th January, 1833, Mr. Simons, for the plaintiff, obtained an order, on motion supported by affidavit that the defendant had absconded and gone beyond the seas, that the defendant should appear to the bill, on or before the 1st of March then next. On the 7th of March, 1833, it appearing, by production of the London Gazette, that a copy of the order for the defendant to appear, had been inserted therein, and, by affidavit, that the order had been published in the defendant's parish-church, and that a copy of it had been posted at the royal exchange, according to the directions of the act, but that the defendant had not appeared, an order was made, on motion, that the plaintiff's clerk in court should attend, at the hearing of

the cause, with the record of the bill, in order to have the same taken *pro confesso* against the defendant. The cause having been set down for hearing, it was ordered, on the 23d March, 1833, on motion, to be placed at the head of the paper of causes for the 27th of that month, and that the plaintiff's clerk in court should then attend with the record. Accordingly, on that day, the clerk in court attended, and a decree *pro confesso* was taken.

Stephens *v.* James.

4 *Simons*, 499.

By a marriage settlement, an annuity for the life of the wife's mother, was assigned, to trustees, for the wife for life, remainder for the husband for life, remainder for the issue of the marriage. Provided that, if the husband should, during the life of the wife or of her mother, become bankrupt, compound with, or assign his effects for the benefit of, his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, *after his wife's death*, sold an annuity to one of the trustees of the settlement, and signed an unstamped agreement to deposit the settlement with him, and authorizing him to retain the annuity so sold, out of the settled annuity: Held, that the husband had forfeited his interest in the settled annuity.

July 8, 1831.

BY the settlement on the marriage of John Stephens with Elizabeth Mary Green, dated the 14th of June, 1817, Joseph Green, deceased, and the plaintiff Elizabeth Mary Green, his wife, the lady's father and mother, granted, to trustees, for the life of Elizabeth Mary Green, the mother, an annuity of 300*l.* to be issuing out of the dividends of a sum of bank annuities (to which Elizabeth Mary Green, the mother, was, solely, entitled for life), for the separate use of Elizabeth Mary Green, the daughter, for her life, but so that she should not anticipate, charge or assign the same, and, after her decease, in trust for John Stephens, for his life, yet so that he should not anticipate, charge or assign the same; and, after the decease of the survivor of them, in trust for the issue of the marriage, as therein mentioned: provided that, in case the said John Stephens should, during the lifetime of the said Elizabeth Mary Green, the mother, and of the said Elizabeth Mary Green, his intended wife, commit any act of bankruptcy on which a commission of bankruptcy should issue, and he be duly declared a bankrupt, or should make a composition with his creditors, for the payment of his debts, although a commission of bankruptcy should not issue against him, or should make any assignment of his effects for the benefit of his creditors, or should take the benefit of any act made or to be made for the relief of insolvent debtors, or *should do any act with a view to assign, charge, incumber or anticipate* all or any part of the growing or accruing payments of the said annuity, then, and in any such case, the life interest or right of the said John Stephens, in or to the said annuity, should, for the benefit of the issue of the said intended marriage, cease

and be void, to all intents and purposes, in the same manner as if the said John Stephens were dead.

Joseph Green died in 1819; and, on the 17th of March, 1821, Mrs. Stephens died, leaving the infant plaintiff the only issue of the marriage. One of the trustees of the settlement never acted, and the other wishing to be discharged, the defendant Thomas Jones, was appointed a trustee of the settlement, in his place, and by an indenture dated the 16th of January, 1826, the annuity of 300*l.* was assigned to him, by the retiring trustee, by the direction of Stephens (who was a party to the deed) upon the subsisting trusts of the settlement.

In January, 1826, Mr. Stephens agreed to grant an annuity of 100*l.* to the defendant Jones; and the following memorandum, dated the 16th of January, 1826, was written on unstamped paper and signed by Stephens: "whereas the said John Stephens hath agreed for the sale of an annuity of 100*l.*, for the life of him the said John Stephens, to the said Thomas Jones, his executors, administrators and assigns, payable quarterly, commencing from the 24th day of January instant, for the sum of 500*l.*, on account of which 500*l.*, the said Thomas Jones hath, this day, advanced to the said John Stephens, the sum of 100*l.* on his promissory note: the said J. Stephens engages that his brother, Evan Stephens, and his brother-in-law, J. H. Brown, shall join him in a proper bond to secure the said annuity, and that the said J. Stephens will also execute a proper warrant of attorney to secure the regular payment of the said annuity. The said John Stephens will procure proper certificates of his age, and also of the age of his late wife's mother, Elizabeth Green, widow, and also deposit, his marriage settlement with his said late wife, with the said Thomas Jones: and he agrees that it shall be lawful, for the said Thomas Jones, after he shall, from time to time, have received the annuity of 300*l.*, as the new trustee, to pay himself or retain such sum or sums as may be due to the said Thomas Jones, at such times, from the said John Stephens, and that receipts from the said Thomas Jones for the annuity now agreed upon, shall be received, as cash, by the said John Stephens, in part of the annuity of 300*l.* secured to him by his marriage settlement, and give proper discharges or receipts accordingly."

A bond and warrant of attorney dated the 6th of February, 1826, were duly executed pursuant to the agreement.

The bill alleged that Jones claimed some interest in the annuity of 300*l.*, by virtue of the assignment of the 16th of January, 1826, and that he pretended that though that assignment purported to be an absolute assignment by way of trust, it was, in fact, intended to be, and was accordingly made and executed to him, by or through the procurement of Stephens, by way of security for the payment, to Jones, of some annuity agreed to be granted, to him, by Stephens. The bill charged that, if the assignment was made, or intended to be made, to Jones, by way of such security, it must be considered fraudulent and collusive on the part of Jones and Stephens, and to have been made with a view to prevent a forfeiture of Stephens's interest under the proviso in the marriage settlement; and that the execution of the assignment, with such view and intention, and under such circumstances as aforesaid, must be considered as having, of itself, caused such forfeiture, the benefit whereof the infant plaintiff claimed.

Jones, in his first answer, did not allude to the memorandum of agreement, but admitted that he intended to retain the arrears of his annuity

[Stephens *v.* James.—4 Sim. 499.]

of 100*l.*, out of the annuity of 300*l.*, and he denied that he claimed any other beneficial interest, under the assignment of January, 1826: he, however, insisted that, even if the assignment had been executed for the purpose of securing his annuity of 100*l.*, (which he denied to be the fact,) yet the same ought not to be considered as fraudulent, collusive or void, as against the infant plaintiff, or as being, in itself, a forfeiture of Stephens's life interest in the annuity of 300*l.*, *inasmuch as the assignment was executed after the death of Mrs. Stephens.* Jones, in his further answer, set forth the memorandum of agreement, and added that the only interest which he claimed in the premises, was a right to retain the arrears of his annuity of 100*l.*, out of the arrears of the annuity of 300*l.*, and which interest arose under the memorandum of agreement.

Sir E. Sugden and Mr. Merivale, for the plaintiffs:

The point raised by the defendant Jones in his answer, is that, as the acts relied upon by the plaintiffs, were done subsequent to the death of Mrs. Stephens, they do not come within the proviso in the settlement. But it is clear that the words: "or should do any act with a view, &c." are general, and are not qualified or restricted by the preceding words: "during the lifetime of Elizabeth Mary Green the mother, and Elizabeth Mary Green the daughter." There can be no doubt that the parties to the settlement intended to make the proviso commensurate with the father's interest. It was more important that the interest of the issue of the marriage should commence, if the acts mentioned in the proviso were done after the death of the wife, than if they were done before that event. The infant is contending with his own trustee, and not with a person claiming adversely. The proviso is not a condition, but it is merely a limitation to the husband so long as he shall not do the specified acts. So if a husband devises an estate to his wife, during her widowhood, and after her death, then over, the gift over is merely a limitation to take effect whenever the widow's interest ceases.

Mr. Knight and Mr. J. Wilson, for the defendant Jones, said that it must be remembered that the proviso in question occurred in a deed, and not in a will, and that it must receive a construction accordingly: that the life of the grandmother, as well as the life of the mother of the infant plaintiff, was introduced into the proviso: that it was intended to work a forfeiture, and not to create a limitation merely, and must be construed strictly: that it had been decided, in several cases, that a proviso restraining an attempt to alienate, was void. Pierce *v.* Win, 1 Vent. 321; Foy *v.* Hynde, Cro. Jac. 696; Wilkinson v. Wilkinson, 3 Swanst. 515.

[The Vice-Chancellor:—The only question is as to the act done. I have no difficulty on the words of the proviso.]

Sir E. Sugden:—The husband's interest in the annuity of 300*l.* was only an equitable interest. The memorandum of agreement, though it was not stamped, was an act done with a view to charge the annuity: it was a positive appropriation of the fund.

The Vice-Chancellor said that the time limited by the proviso with respect to the first set of acts, was not connected with the second set of acts; as to which no time was limited: that he was of opinion that the agreement which Mr. Stephens had signed, was an act done by him with a view to charge or encumber the annuity of 300*l.*, and, consequently,

that his interest had ceased, and the infant plaintiff had become entitled to the annuity.*

Lyde *v.* Mynn.

4 *Simons*, 505.

A. granted an annuity to B., and covenanted to charge, any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. A. became bankrupt, and afterwards obtained his certificate, and then his wife died, having, under a power in her settlement, bequeathed to him an annuity of 700*l.* A. was decreed to execute a proper deed to charge the annuity of 700*l.* with payment of the annuity granted to B.

July 11, 1831.

BY the settlement on the marriage of the defendant, John Mynn, with Catharine Robinson, dated in July, 1823, power was reserved to the lady, in the event of her surviving the defendant, to dispose of her property comprised in the settlement, for the benefit of such person or persons, and in such manner as she should appoint. By an indenture, dated the 31st of December, 1824, the defendant, in consideration of 1110*l.*, granted, to the plaintiff, an annuity of 160*l.*, for his life, payable quarterly, the first payment to be made on the 31st of March then next; and J. L. West, a surety, covenanted, with the plaintiff, for the due payment of the annuity; and the defendant covenanted, with the plaintiff, that, in case of the decease of his wife in his lifetime, he would, within three calendar months after her decease, charge and encumber all such property as he might become possessed of in the event of her decease as aforesaid, either under her last will and testament, or otherwise, as and for a further and better security for the payment of the annuity.

The annuity was in arrear from the 31st January, 1825.

Mrs. Mynn, by her will made in pursuance of the power reserved in the settlement, and dated the 26th of November, 1826, gave her property to trustees, in trust to purchase, thereout, an annuity of 700*l.*, and to pay the same to the defendant for his life, half-yearly, on the 5th of January and 5th of July, the first payment to be made on such of the said days as should first happen after her death. On the 18th of December, 1826, a commission of bankrupt issued against the defendant, under which he was found a bankrupt. The defendant's certificate under the commission was allowed by the Lord Chancellor, on the 19th of March, 1827. In the same year West became bankrupt, but never obtained his certificate. On the 11th of June, 1827, Mrs. Mynn died; and, on the 7th of July, 1829, her executors proved her will, and they afterwards purchased an annuity of 700*l.*, for the defendant as directed by the will. The plaintiff never made any proof in respect of his annuity, under either of the commissions.

Mynn having refused to charge or encumber the annuity of 700*l.* as a

* The arguments and judgment are given *ex relatione.*

[Lyde *v.* Mynn.—4 Sim. 505.]

further security for the plaintiff's annuity, the bill was filed against him and the trustees and executors of his late wife's will, praying that Mynn might be decreed to pay, to the plaintiff, the arrears of the annuity of 160*l.*, and that he and the trustees and executors might be decreed to concur in charging the annuity of 700*l.* with the due payment of the annuity of 160*l.*, for the time to come, and with all the arrears thereof.

Mynn, in his answer, said that he was advised that, in case his late wife had died before the allowance of his certificate, the annuity of 700*l.* would have vested in his assignees, for the general benefit of his creditors; and that, at the date and execution of the annuity-deed, and thence until his wife's death, the annuity of 700*l.* had no existence, and he had not any right or title thereto, or interest therein, in possession, reversion, expectancy or contingency: and he insisted that, under the circumstances before mentioned, the plaintiff's annuity was no longer payable, and he claimed the same benefit of his certificate, as if he had pleaded it in bar to the relief prayed by the bill.

Mr. Pepys and Mr. Parker, for the plaintiff:

The right of an annuity creditor to avail himself of the securities which he may have for his annuity, is not at all affected by the bankrupt act, 6 Geo. 4. c. 16.* That statute has nothing to do with the question

* The following sections of 6 Geo. 4. c. 16, were referred to in the course of the arguments:

Sect. 54. "And be it enacted, that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof, to the date of the commission.

Sect. 55. "And be it enacted, that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved, under the commission against such bankrupt, for the value of such annuity, and for the payment thereof; and if such surety after such proof pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due), pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of four per cent per annum, from the time of notice of such proof, and of the amount thereof being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satsified as aforesaid, by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety in respect of such annuity; provided that such surety shall be entitled to credit in account with such annuitant, for any dividends received by such annuitant, under the commission before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

Sect. 121. "And be it enacted, that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby

raised by this record. A person who has a good security upon property not in possession, is not bound to give up that security, and to prove his debt under the commission, by which he may get nothing. The 54th and 121st sections of the bankrupt act, have reference to the personal liability only of the bankrupt. A mortgagee who proves his debt, is not deprived of the benefit of his security; although the bankrupt's personal liability is gone. The act deals with, and discharges the bankrupt from personal liability alone. If an annuity creditor chooses to look merely to the property that is charged with his debt, he is at liberty to do so; the liability of the property remains, although the personal obligation is gone. Taylor *v.* Young, 3 Barn. & Ald. 521.

Mr. Knight, Mr. Phillimore and Mr. Wakefield, for the defendant, said that the bankrupt act placed an annuity on the same footing as a debt, and, consequently, that, in this case, when Mynn obtained his certificate, the annuity ceased: that the object of this suit was to revive the annuity, and to make it a charge upon property that did not come into possession until after the annuity had been released.

The Vice-Chancellor:—The act of the 6 Geo. 4. c. 16, discharges the bankrupt; but does not discharge the property which he has made liable to the demand. The property which he has charged specifically, remains liable, although he is discharged from his personal obligation. Decree according to the prayer of the bill.

Tootal *v.* Spicer.

4 *Simons*, 510.

IN a creditor's suit, the plaintiffs are entitled to their costs, as between solicitor and client, though the fund is insufficient to pay the debts.

July 3, 13, 1831.

made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt."

Broad *v.* Wickham.

4 *Simons*, 511.

Where a person takes forcible possession of estates over which a receiver has been appointed, an order for his commitment will be made without an order *nisi* being previously obtained.

July 13, 1831.

IN this case a person had taken forcible possession of the estates in the cause, over which a receiver had been appointed by the court, and Mr. Spurrier *had obtained an order for his commitment*, on affidavit of service of the notice of motion, the party not appearing.

But the registrar, on the authority of Van *v.* Price, 1 Dick. 91; and Williams *v.* Johns, 2 Dick. 477, declined to draw up the order, on the ground that Mr. Spurrier ought to have obtained an order *nisi*, before he moved to commit the party. Mr. Spurrier accordingly renewed his motion, and stated the grounds on which the registrar declined to draw up the order.

The Vice-Chancellor ruled that the order *nisi* need not be obtained, and directed the order of commitment to be drawn up.*

Bissett *v.* Antrobus.

4 *Simons*, 512.

The court refused to allow 2200*l.* for the funeral expenses of a deceased nobleman whose personal estate was believed to be solvent at his death, but ultimately, from unforseen circumstances, proved to be insolvent.

July 16, 1831.

AT the death of the late earl of Peterborough in June, 1814, his personal estate was estimated, for probate, at 40,000*l.*, and his simple contract debts were considered to be of trifling amount: ultimately, however, it proved insufficient to pay those debts, owing (amongst other causes) to certain canal shares, of which it partly consisted, falling in value, and to a demand being established against it to a much greater amount than had been anticipated. The executors, on receiving intelligence of the earl's decease, wrote to a confidential friend of his, who had, for several years, resided with him, and transacted matters of business for him, and directed that the funeral should be respectable; and, with a view to economy, recommended that an undertaker at Bath, near which city the earl died, should be employed, rather than one sent from London. The executors having gone to attend the funeral, found that preparations had been made

* See Pool *v.* Sacheverell, 1 P. W. 675; and Vansandau *v.* Rose, 2 Jac. & Walk. 264.

[Bissett *v.* Antrobus.—4 Sim. 512.]

for it, on a much more expensive scale than they had intended; and they expressed their surprise and displeasure to the gentleman who had the direction of it, upon which he produced an estimate of the expense, and said that the directions had been given with the concurrence of the plaintiff, who was a brother-in-law of the deceased, and the father of a lady whose issue male were the residuary devisees and legatees under the earl's will. Upon receiving this explanation, the executors consented to attend the funeral, which they at first hesitated about, on account of the expensive preparations for it. When the undertaker's bill was delivered, it was found to exceed the estimate before-mentioned; and the charges appeared to be so extravagant, that the executors thought it incumbent on them to resist the payment of it. Upon which the undertaker commenced an action against them; and they, by the advice of counsel, paid 2100*l.* into court, and then defended the action. The undertaker obtained a verdict for a sum less, by several hundred pounds, than the amount of his bill, but greater than the money paid into court.

The bill was filed by some of the creditors of the late earl, on behalf of themselves and others, against the executors and other parties, praying that the personal estate of the deceased might be applied in payment of his debts, and that the deficiency of his personal estate might be made good out of his real estates, to the extent of his specialty debts, and that his assets might be marshalled. The usual decree having been made, the Master, in taking the accounts directed by it, allowed the executors several sums in respect of the funeral and the action, amounting, together, to 2811*l.* 1*s.* 2½*d.*, of which 600*l.* 13*s.* 5*d.* were for costs and damages in the action. The plaintiffs excepted to the report, alleging that the Master ought to have disallowed all those sums beyond 100*l.*, which they insisted was the reasonable sum to be allowed for the funeral of a nobleman who died insolvent.

Mr. Knight and Mr. W. Russell for the plaintiffs, in support of the exceptions.

Sir E. Sugden and Mr. Sidebottom for the executors, in support of the report, said that at the time when the expenses were incurred, it was not and could not be known, that the deceased's estate was insolvent: that the executors did not pay the funeral expenses, except by compulsion, and that, having acted according to the best of their judgment, they ought not to be made liable.

The Vice-Chancellor:—It appears to me that, under the circumstances of this case, I ought not to allow this large sum for the expenses of the funeral. In a case lately decided at law, the court refused to allow 69*l.* Let the exception, therefore, be allowed, and refer it to the Master to inquire and state what sum ought to be allowed for the expenses of the funeral.

Price *v.* Evans and wife, Shuker and wife, and others.

4 *Simons*, 514.

If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the court will, after a decree obtained in a suit, by another creditor, for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally.
July 20, 1831.

IN Hilary Term 1831, Henry Brown, a bond creditor of Edward Edwards, who died intestate in 1826, commenced an action on his bond, in the Court of Exchequer, against the daughters and co-heirs of the intestate, and their husbands, who were the defendants in this suit. The defendants pleaded, amongst other pleas, that they had not, at the time of exhibiting the bill of the said plaintiff in that behalf, nor at any time before or since, any lands, tenements or hereditaments by descent from the said Edward Edwards. To this plea the plaintiff replied, under 3 W. & M. c. 14, that the defendants, after the death of Edward Edwards, and before the commencement of the action, to wit, on the 1st day of June, 1830, had divers lands and tenements in fee simple, by descent from the said Edward Edwards.* The defendants rejoined to the replication, denying that, after the death of the intestate, and before the commencement of the action, they had any lands or tene-

* By 3 W. & M. c. 14, it is enacted "That in all cases where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, &c. descending to him, and shall sell, alien or make over the same before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts, in an action or actions of debt, to the value of the said land so by him sold, aliened or made over, in which cases all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, &c. *bonâ fide* aliened before the action brought shall not be liable to such execution."—Sect. 5.

"Provided that where any action of debt upon any speciality is brought against any heir, he may plead *reins per descent* at the time of the original writ brought, or the bill filed against him; any thing herein contained to the contrary notwithstanding: and the plaintiff in such action, may reply that he had lands, tenements or hereditaments from his ancestor, before the original writ brought or bill filed, and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and, thereupon, judgment shall be given and execution shall be awarded as aforesaid; but, if judgment be given against such heir by confession of the action without confessing the assets descended, or upon demurrer or *nil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, &c. so descended."—Sect. 6.

See 11 Geo. 4 and 1 Will. 4. c. 47, as to debtors dying after the passing of that act, July 16, 1830. For a report of the proceedings in the action in the exchequer, see 1 Crompt. & Jerv. 583.

[Price *v.* Evans and others.—4 Sim. 514.]

ments by descent from the intestate; whereupon issue was joined by the plaintiff. The action was tried at the following assizes for the county of Salop, when a verdict was found for the plaintiff, upon the plea of *riens per descent;* but the plaintiff not having offered, at the trial, any evidence of the value of the lands descended, and the jury, consequently, not having found such value, the defendants, in the following Easter Term, moved the Court of Exchequer for a rule to show cause why the plaintiff should not be restrained from issuing execution in the action, until a jury should have inquired of the value of the lands descended, as required by the statute: and the court having granted a rule to show cause accordingly, in Trinity Term, 1831, it was made absolute in the following terms: "It is ordered that the plaintiff be at liberty to issue a *venire de novo,* unless the parties agree, within a fortnight, to refer the value of the assets descended to some gentleman at the bar, and to amend the record accordingly."

Shortly after the commencement of the action, the bill in this suit was filed by Price, a bond creditor, on behalf of himself and all other the creditors of the intestate, against the co-heirs and administrators, praying that the intestate's debts might be paid out of his real and personal assets. On the 4th of March, 1831, the usual decree was made, and Brown's agent and attorney were served with notice of it.

A motion was now made, by the defendants, that Brown might be restrained from taking a *venire de novo,* or any other further proceedings in respect of his action at law.

The affidavit in support of the motion stated that the decree was pronounced before the trial of the action, and was then being prosecuted in the Master's office, and that the peremptory advertisement for creditors had been published; and that an application for an injunction to restrain Brown from further proceeding on his verdict, would have been made immediately after the trial, if the verdict had been an efficient one, binding the assets descended; that the defendants not being personally liable in the action, the motion was made solely to protect the assets; that Brown intended to take a *venire de novo,* and would obtain judgment, and exhaust the whole of the real assets of the intestate, which, together with the personal estate, were insufficient to pay, in full, the claims of his creditors.

Mr. Duckworth, for the defendants, cited Terrewest *v.* Featherby, 2 Mer. 480; Fielden *v.* Fielden, 1 Sim. & Stu. 255; Lord *v.* Wormleighton, Jac. 148, and Lickbarrow *v.* Mason, 6 T. R. 131.

Mr. Jas. Russell, for Brown, the creditor, contended that the injunction ought not to be granted, because the defendants, having pleaded false pleas, were personally liable, to the plaintiff, at law.

The Vice-Chancellor:—If the co-heirs of the intestate are liable at law, they must remain so; but I see no objection to my making an order protecting the assets.

Order that Henry Brown, the creditor, be restrained, by the injunction of this court, from taking out execution against the assets of the intestate, and that the defendants do pay, to the said Henry Brown, his costs of this application.

Bond *v.* Bond.

4 *Simons*, 518.

A defendant who has joined in commission, cannot obtain a new commission, except upon a special application and with notice.

June 20; July 21, 1831.

THE defendant had joined in commission, and had notice of the time and place of executing it. The commissioners attended at the time and place appointed, but no interrogatories were exhibited on the part of the defendant, and the commission was returned. Afterwards the defendant, on the ground that the time between the notice and the execution of the commission was not sufficient for him to obtain evidence in support of his defence, obtained, *without notice*, an order to enlarge publication, and that he might have a commission for the examination of witnesses, and that the plaintiff's clerk in court might, in four days after notice, join and strike commissioners' names with the defendant's clerk in court, or, in default thereof, that the defendant might have such commission directed to his own commissioners.

Mr. Cockerell, for the plaintiff, now moved to discharge the above order, for irregularity, on the ground that it had been obtained without notice. He said that a defendant who had joined in commission, could not obtain another commission, except upon a special application, and under special circumstances. Beam. Ord. 30. 72 and 192; Newl. Pract. 257. 283; Barnsley *v.* Powell, 3 Atk. 593; S. C. 2 Dick. 793; Mineve *v.* Row, 1 Dick. 18; Geast *v.* Barber, 2 Bro. C. C. 1; Richardson *v.* Louther, 1 Ch. Ca. 273: Vaughan *v.* Worrall, 2 Madd. 322.

Mr. Kindersley, for the defendant.

The Vice-Chancellor held that the order complained of had been irregularly obtained: but, to save the expense of a special application, it was arranged that the defendant should pay, to the plaintiff, the costs of the motion; and that, upon the defendant, his clerk in court and solicitor making an affidavit that they had not seen, or heard read, or been informed of the depositions which had been taken, a commission should issue pursuant to the order, but without prejudice to the plaintiff setting down the cause for hearing.

Churchman *v.* Ireland.

4 *Simons*, 520.

A testator devised all his estates and effects, both real and personal, which he should die possessed of, interested in or entitled to, upon certain trusts for the benefit of his grandchildren, one of whom was his heir. The testator afterwards purchased lands: Held, that the heir must elect between the benefits given him by the will, and the after-purchased lands which had descended upon him.

June 24, 25, 1831.

THOMAS IRELAND, by his will, dated the 18th of May, 1820, and duly executed and attested, gave, devised, and bequeathed, subject to the payment of his debts and testamentary expenses, all and singular his estate and effects whatsoever and wheresoever, and of what nature or kind soever, both real and personal, which he should die possessed of, interested in, or entitled unto, to three trustees, their heirs, executors, administrators and assigns, upon trust to manage and carry on the business he then carried on, and to receive and take the profits thereof, and of every part thereof, and the rents, interest, dividends and proceeds of all other his estate and effects, as the same should become due and payable, and, out of the moneys thereby arising, in the first place, to pay and apply so much thereof as in their discretion should be necessary for the support of his son John and his wife, and the maintenance and education of their children, for his life. And the testator directed that the remainder of the said profits, rents, interest, dividends and proceeds of his said estate, should be placed out by his trustees, upon government securities, for the benefit of his grandchildren as thereinafter mentioned: and, after the death of his son John, the testator gave 20*l.* a year, to his wife, for her life: and he directed his trustees, immediately after the death of his said son, to sell and dispose of all his, the testator's, then real and personal estate, and to distribute one-third part of the moneys arising from such sale among all the children of his said son, and to pay and apply the other two-thirds in manner therein mentioned.

In the year 1824 the testator purchased a field adjoining to his other property. His son John died in his lifetime. In July, 1827, the testator died, leaving the defendant, Thomas Ireland, the eldest son of his son John, his heir-at-law.

The bill was filed to have the will established, and the trusts of it carried into execution: and the question made, at the hearing of the cause, was whether the defendant Thomas Ireland the heir, was bound to elect between the benefits given him by the will, and the property subsequently purchased, which had descended upon him as heir to the testator.

Sir E. Sugden and Mr. Jacob, for the plantiffs, said that it was clear, from the first clause in the will, and from the direction to sell all the testator's *then* real and personal estates, that he intended to dispose of all the estates that he might thereafter become possessed of: that it was decided, in Thellusson *v.* Woodford, 13 Ves. 209; 1 Dow. P. C. 249, that the court might look at a will for the purpose of raising a case of election against the heir.

[Churchman *v.* Ireland.—4 Sim. 520.]

Mr. Tinney and Mr. Bagshawe, for the heir:

In Thellusson *v.* Woodford, the testator expressly states that he contemplates entering into contracts for the purchase of lands, and directs that, if he should die before those contracts were completed, they should be carried into execution, by his trustees, after his death, and that the estates to be purchased should be conveyed to his trustees, upon the trusts of his will. Unless it had appeared that the testator contemplated future purchases, and that he had them in view when he made his will, the decision in Thellusson *v.* Woodford would not have been made. Besides, in that case, the testator was not speaking of the estates which he then had: the terms used by him did not apply to those estates, but related, exclusively, to the estates which he might, thereafter, agree to purchase.

In order to raise a case of election against the heir, it must be shown, unequivocally, that the testator had future purchases in his contemplation. It is not even proved that there was any contract for purchase existing at the date of the will.

This case falls within Back *v.* Kett, Jacob's Rep. 534.

Mr. Pitman appeared for the defendants, who were in the same interest as the plaintiffs.

The Vice-Chancellor:—I recollect thinking, when the decision in Back *v.* Kett was pronounced, that it was rather an arbitrary decision.

The words used by the testator show, in a most marked manner, that he intended to pass not only the estates he had at the date of his will, but also all that he should be in possession of at the time of his decease. It cannot be denied that the words would pass all the personal estate that the testator was possessed of at his death; and, if it is clear as to future personal estate, how can it be said that he had not the same intention as to real estate, when they are both disposed of in the same sentence? Can any one say that he had one intention as to the personal estate, and a different intention as to the real estate, when he uses the same words as to both? The first clause of the will as clearly points to future real estates as to future personal estate. I do not think that much is to be inferred from the word "then," as some of the estates might be sold to pay debts.

I think, upon the authority of Thellusson *v.* Woodford, that this is a case of election.*

* This decision was affirmed by the Lord Chancellor. See 1 Russ. & Mylne, 250.

Douglas *v.* Russell.

4 *Simons*, 524.

An assignment by the owners of a ship of freight *to be earned* is good.

A. a ship owner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party afterwards was delivered to B. by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt: Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it.

A ship-owner assigned fifteen-sixteenths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold: Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship.

July 9, 11, 1831.

BY an indenture dated the 13th of December, 1824, and made between William Gibson, of Liverpool, merchant, of the one part, and the plaintiffs, who were merchants in London, of the other part, reciting that Gibson was the owner of certain shares in the ships La Plata and Hannah, and was the sole owner of the ship Anacreon, then lying at St. John's, New Brunswick, and that he had applied to the plaintiffs to open a credit in his favour, to the extent of 7000*l.*, by accepting drafts, or bills of exchange to be drawn on the plaintiffs, by him, as he might find it necessary, and for which he had proposed to provide previously to their coming to maturity, and that, in order to induce the plaintiffs to accede thereto, he had proposed to assign to them his interest in those ships, to which they had agreed; Gibson assigned, to the plaintiffs, all his shares, right and interest in the ships, with the tackle, apparel and appurtenances thereunto belonging, subject to a proviso for the redemption of the same on payment by Gibson, to the plaintiffs, after request in writing, of all such sums of money as the plaintiffs should become liable for as aforesaid, and as they should, at any time thereafter, advance and pay, or become liable to pay, for his use, or on his account, or which might be due or owing to the plaintiffs, together with interest at 5*l.* per cent per annum, to be computed from the respective times of the advance, payment, or becoming due thereof respectively. And Gibson covenanted that, on the arrival of the Anacreon in England, all proper deeds, instruments and memorandums should be executed, and all proper measures taken for completing the assignment thereof to the plaintiffs. And it was agreed that the plaintiffs should stand possessed of the ships upon trust, if default should be made in payment of the said sums of money, or the interest thereof, after such request as aforesaid, to sell the same and apply the proceeds in payment of such sums of money as might be due and payable, by Gibson, to the plaintiffs, or which the plaintiffs should become liable for under the said indenture, with all interest in respect thereof, and, should pay the surplus of the moneys to Gibson, his executors, administrators and assigns: and it was declared that the indenture should not extend to

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secure, to the plaintiffs, a greater sum than 7000*l.* By an indenture of the 11th of January, 1825, reciting that the Anacreon had not then arrived at Liverpool, and that her arrival was not expected till March then next, Gibson assigned, to the plaintiffs, his three-fourth shares in the ship Ulverstone, which was then on a voyage to New Orleans, upon the same trusts as were declared concerning the other ships; but subject to a proviso for making void the assignment upon the transfer of the Anacreon being completed.

Gibson being the owner of another ship called the Elizabeth, by an indenture of the 20th of January 1826, assigned, to the plaintiff, fifteen-sixteenth shares of that ship (the remaining sixteenth being reserved for the captain, who, however, declined to take it) upon the same trusts as were declared concerning the other ships.

On all these transactions the requisites of the ship registry acts were complied with.

By an indenture of the 17th of July, 1826, and made between Gibson of the one part, and the plaintiffs of the other part, after reciting that it might happen, by reason of the depreciation of the value of the said ships or vessels, or by other contingencies, that the before-mentioned assignments might prove inadequate securities, to the plaintiffs, for the moneys thereby intended to be secured, and that it might happen that, to meet Gibson's occasions, the plaintiffs might extend their credit in his favour, beyond the then amount thereof; and that, in order to provide for such contingencies, Gibson had agreed to assign, to the plaintiffs, for their further security, all his share and interest in all the freight and freights earned *or to be earned* by the four aftermentioned ships, and all policies of insurance effected or to be effected on such freight and freights, upon the trusts thereinafter expressed: it was witnessed that, in pursuance of the said agreement, and in consideration of such debts or sums of money as then were, or thereafter might become due and owing, by Gibson, to the plaintiffs, in respect of any liabilities or advances, of the plaintiffs, for his use or on his account, or otherwise, with lawful interest for the same respectively, and, for better securing the payment of the same, Gibson assigned, to the plaintiffs, all his shares, right and interest whatsoever, of and in all sums of money then due and payable, or *thereafter to become due or payable*, to the owners of the La Plata, the Hannah, the Ulverstone and the Elizabeth, for the use, hire or freight thereof, under any existing *or future* charter-party or charter-parties, or other contract or contracts, or otherwise howsoever, and of and in all policies of insurance which then were, or might thereafter be effected on those ships or any of them, and on the freight or freights, sum or sums of money thereby assigned, and of and in all and every charter-party and charter-parties, then or *thereafter* to be made or entered into, in respect of the same ships or any of them: upon trust, to call in and receive all the sums of money which were, or might be due upon or by virtue of all such freight, policies of insurance, and other the premises thereby assigned, when and as the same respectively should become due and payable; and thereout, after deducting their expenses, to retain all such sums of money as then were, or might thereafter be or become due, by Gibson, to the plaintiffs, upon any account whatsoever, or which they should become liable to pay for him or on his account, with interest at 5*l.* per cent per annum; and, after full payment and satisfaction thereof, in trust for Gibson: and Gibson appointed the plaintiffs to be his attorneys, to recover

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and receive the sums which might become due for or in respect of the freights, policies and premises thereby assigned.

Upon the security of these assignments, the plaintiffs advanced various sums to Gibson, and accepted bills of exchange on his account; so that, in April, 1827, he was indebted to them in 8000*l.*: but the plaintiffs did not take possession of, or exercise any acts of ownership over the ships, but suffered Gibson to continue in the possession and control of them, and to continue to receive their freight and earnings, and to act, in all respects, as their owner. By a charter-party of the 16th of January, 1827, and made between Gibson of the one part, Solomon Levey, of London, merchant, on behalf of himself and his co-partner, Daniel Cooper, of Sydney, New South Wales, of the other part, Gibson let to freight the Elizabeth, then lying in the port of Liverpool, to Levey & Cooper, for the voyages after-mentioned; and Gibson covenanted that the vessel should be ready to take on board a cargo within fourteen days from the date thereof, and should then proceed to Sydney, and there deliver her cargo to the house of Cooper & Levey, and then take on board another cargo, and proceed to London: and Levey & Cooper covenanted to pay freight, to Gibson, at such rate per ton, upon the outward and homeward cargoes, as therein mentioned, the payments to be made as follows, 500*l.* within twenty days after the commencing loading at Liverpool, and the remainder of the freight for the outward-bound cargo, within thirty days after the discharge of the same at Sydney, by government bills on the lords of the treasury, and, that the homeward freights should be paid in London, as customary for vessels in the same trade.

Pursuant to this charter-party, the Elizabeth was loaded, by Levey, at Liverpool, and in February, 1827, proceeded on her voyage to Sydney, where she arrived, in August following. The whole of the freight for this voyage was received by Gibson. On the 3d of October, 1827, the plaintiffs' solicitors served Levey with a written notice of the assignment of the 17th of July, 1826, and required him not to pay any moneys due, or to become due, from him, for the freight of the Elizabeth, to any person but the plaintiffs. In November, 1827, Gibson having enclosed the charter-party, in a letter to Levey, which the latter refused to take in on account of the postage, the plaintiffs, under an order from Gibson, obtained the letter from the post-office and took out the charter-party. The plaintiffs having informed Gibson that they had obtained the charter-party, he wrote to them, and desired that they would keep possession of it until the arrival of the Elizabeth.

On the 15th of March, 1828, Gibson became bankrupt, and the defendants, Russell & Phillips, were chosen his assignees. In April, 1828, the Elizabeth returned from Sydney to the port of London; and, immediately on her arrival, the assignees took possession of her, together with her cargo and bills of lading, and gave notice to Levey not to pay any part of the homeward freight, to any persons but themselves.

The crew of the Elizabeth having threatened to commence proceedings, in the admiralty court, for the recovery of their wages, the plaintiffs, for the protection of their interest in the ship, paid the wages, and also the charges for pilotage, repairs, dock and other dues on account of the ship. It was afterwards agreed, between the plaintiffs and the assignees, that the ship should be sold, by the ship-broker of the plaintiffs, and that the expenses of the sale should be borne by the parties, in proportion to their

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shares. The ship was sold accordingly; and the plaintiffs conceiving that, as they were only mortgagees, the owner of the ship ought to reimburse them for what they had paid for the seamens' wages and otherwise on account of the ship, claimed to retain the amount of their disbursements out of the proceeds of the sale of the one-sixteenth, belonging to the assignees. But the assignees would not allow the plaintiffs' claim, and refused to deliver the bill of sale to the purchaser, after they had executed it, unless their share of the proceeds were paid to them clear of all deductions, except for the expenses of the sale; and accordingly the plaintiffs paid, to the assignees, their share of the proceeds, without deducting the disbursements, but under a protest.

The bill prayed that Levey might be ordered to pay the homeward freight, to the plaintiffs; that the plaintiffs might be declared to be entitled to a lien on the one-sixteenth of the Elizabeth which belonged to the assignees, for the amount of the wages of the crew and the other payments made by them on account of the ship, and that the plaintiffs might receive satisfaction, out of the bankrupt's estate, for so much of their disbursements as the one-sixteenth should not extend to pay.

The defence set up by the assignees was: 1st. That the assignment of the 17th of July, 1826, so far as it related to freight to be earned, was void:

2d. That the homeward freight remained in the order and disposition of the bankrupt, at the time of his bankruptcy:

3d. That the assignees were not answerable for more than one-sixteenth of the seamens' wages and other disbursements on account of the ship.

Sir E. Sugden, Mr. Knight, and Mr. Campbell, for the plaintiffs:

We admit that, at law, an assignment of freight to be earned, is bad; but, in a court of equity, such an assignment is good. Robinson *v.* Mac donnell, 5 M. & S. 228. In re ship Warre, 8 Pri. 269, note. In this case the freight and the vessel are assigned to the same person; and the right to the freight must always follow the right to the vessel. Dean *v.* M'Ghie, 4 Bing. 45. It was decided, in Mestaer *v.* Gillespie, 11 Ves. 621; that, though the assignment of a vessel was bad under the ship-registry acts, it might be good as to the freight. Here, however, we are out of the reach of any objection founded on those acts, for they were all complied with.

Before the bankruptcy, notice of the assignment of the freight was given to the charterer and, by Gibson's authority, the charter-party was deposited with the plaintiffs. Every thing, therefore, was done to take the freight out of the order and disposition of the bankrupt.*

The assignees stand in the place of the bankrupt. He was the owner in possession, and therefore was liable to pay all the expenses of the voyage. If Gibson had remained solvent, he could not have thrown those expenses upon the fifteen-sixteenths which were mortgaged to the plaintiffs. They never could have been sued either for the wages or for the expenses, but the mortgagor might have been sued for them. The 45th section of 6 Geo. 4. c. 110, is in the following words: "And be it further enacted, that when any transfer of any ship or vessel, or of any share or

* *Ex parte South*, 3 Swans. 392. See Williams *v.* Thorp, 2 Sim. 257; and *Ex parte Colvill* in the matter of *Severn*, Montagu's Cases in Bankruptcy, 110.

shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then, and in every such case, the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer, be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made; except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available, by sale or otherwise, for the payment of the debt or debts, for securing the paymentof which such transfer shall have been made." 3 & 4 Will. 4. c. 55.

The plaintiffs have paid what they were not liable for; and, therefore, they have a right to stand in the place of those whom they paid. The crew had a lien on the ship for their wages; and, as the plaintiffs have satisfied their demand, the lien is preserved to them, and the assignees must take the one-sixteenth, subject to the same lien as Gibson would have taken it.

At the conclusion of the arguments for the plaintiffs, the Vice-Chancellor expressed it to be his opinion that the plaintiffs had no equity to throw the whole of the seamens' wages upon the one-sixteenth of the ship, which, at the time of the assignment, was reserved for the captain of the ship, but which he declined to take. Annett *v.* Carstairs, 3 Campb. 354; Dean *v.* M'Ghie, 4 Bing. 45; Briggs *v.* Wilkinson, 7 B. & C. 30; and 6 Geo. 4. c. 110, s. 45.

The Solicitor-General and Mr. Blunt, for the defendants, the assignees of Gibson:

An assignment of future freight is absolutely void. It is not a *chose in action*, but a mere possibility; and if, as the counsel for the plaintiffs have admitted, it is not assignable at law, how can it be assignable in equity. The law in both courts must be the same. The assignment of the ship and of the freight, having been made at different times, and by different instruments, must be considered as made to different parties; and, if an assignment of freight to be earned is bad at law, how can there be an equity to make it good in this court? In the case of the ship Warre, the order pronounced was in opposition to the reasoning; for Lord Eldon, ultimately, granted the prayer of the petition: that case therefore is an authority in favour of the assignees.

There is no evidence to show that the freight was taken out of the order and disposition of the bankrupt. At the time of the assignment, the Elizabeth was on a voyage to Quebec: on her return, the whole of the freight was received by the bankrupt. She then sailed to New Brunswick, and the whole of the freight, both outward and homeward, was received by the bankrupt. In February, 1827, she sailed to New

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South Wales, and the whole of the outward freight was paid to the bankrupt, before the commencement of the voyage. The plaintiffs, therefore, did not consider themselves entitled to the freight. And, moreover, the bankrupt paid all the expenses of the several outfits of the ship, and entered into all the contracts respecting it, without any interference on the part of the plaintiffs. Lingard *v.* Messiter, 1 Barn. & Cress. 308.

Mr. G. Richards, for the defendant, Levey.

The Vice-Chancellor:—I entertain no doubt upon this case.

The main question is whether the plaintiffs are entitled to the whole proceeds of the freight, for the voyage from Sydney to the port of London.

It appears that, in December, 1824, Gibson had applied to the plaintiffs to open a credit in his favour, to the extent of 7000*l.*; and that, in order to secure the advances which they might make, to him or on his account, to an amount not exceeding that sum, he made an assignment, to them, by way of mortgage, of certain ships and shares of ships to which he was entitled. On the 11th of January, 1825, Gibson assigned, to the plaintiffs, his interest in another ship, called the Ulverstone, upon the same trusts as had been declared by the deed of December, 1824; and, in January, 1826, Gibson made a similar assignment, to the plaintiffs, of fifteen-sixteenths of a ship called the Elizabeth. Considerable dealings having taken place between Gibson and the plaintiffs, by an indenture of the 17th of July, 1826, he assigned, to the plaintiffs, his shares and interest in all sums of money then due or thereafter to become due, for the freight of the Elizabeth, and of the other ships, under any existing or future charter-parties, in trust to secure, to the plaintiffs, the sums then due and thereafter to become due from him. In January, 1827, the Elizabeth was chartered by the defendant Levey; and she, soon afterwards, sailed from Liverpool, to Sydney, in New South Wales. In April, 1828, she returned to the port of London; and Gibson having shortly before become bankrupt, she was taken possession of, on her arrival, by an agent for his assignees.

Now, is there any thing in the policy of the law to prevent an assignment of future freight, by the owner of a ship. There can be no more objection to such an assignment, than to a contract for the assignment of the freight of a voyage intended to be made, by a ship, which the party making the contract has it in contemplation to purchase; which is the case put, by Lord Eldon, in his judgment in the case of the ship Warre.

At the time of the assignment, the Elizabeth was on a voyage to Quebec; and, when she returned, her freight was received by Gibson. He also received the freight for the subsequent voyage to New Brunswick, and also for the outward voyage to New South Wales. But does it follow, because the assignees have permitted order and disposition to remain as to some of the freight, that they are not entitled to receive any subsequent freight? A mortgagee may permit the mortgagor to receive the rents of the mortgaged estate, for a certain time after the mortgage, but that does not preclude him from subsequently obtaining possession of the estate and receiving the rents.

In October, 1827, Gibson sent the charter-party, inclosed in a letter, to Levey. Levey refused to take it in, because he did not choose to pay the postage. Gibson afterwards sent an order, to the plaintiffs, by means

of which they received the charter-party. The plaintiffs then were placed in a situation which prevented any objection being made, that the assignment of the freight was not complete, on account of their not having the charter-party in their possession.

In October, 1827, Levey was served with what appears to me to have been a clear notice that there had been an assignment of the freight to the plaintiffs. The plaintiffs, therefore, before the bankruptcy, had all the possession of the freight that, from the nature of the case, they could have had, and consequently it did not remain in the order and disposition of the bankrupt at his bankruptcy.

Declare that the plaintiffs are entitled to receive the whole amount of the homeward freight of the ship Elizabeth, pursuant to the charter-party in the pleadings mentioned, and to go in, under the commission issued against him, and prove the remainder of their debt against his estate: order the Master to tax the plaintiffs their costs, except the costs herein reserved, and except also such as relate to the claim made by the plaintiffs, to charge the proceeds the one-sixteenth share of the defendants, the assignees, with the whole amount of the disbursements and expenses on account of the ship: order the Master to tax the defendants, the assignees, their costs occasioned by such claim; and also to tax the defendant, Levey, his costs of the suit, which are to be paid to him by the plaintiffs, and thereupon the bill is to stand dismissed as against him: order the Master to deduct, from the plaintiffs' costs the amount of the costs directed to be taxed for the defendants, the assignees, and the balance, together with the amount of Levey's costs, to be paid, by those defendants, to the plaintiffs. Declare that the defendants, the assignees, are to pay one-sixteenth part of the disbursements and expenses on account of the ship after her return from her last voyage.*

Leeds *v.* Barnardiston.

4 *Simons*, 538.

A ward of the court married, under twenty-one, with the consent of her father, but without the consent of the court, and prior to her marriage a settlement was made of her property. On her attaining twenty-one, she and her husband applied to have her property transferred to the trustees; which was ordered upon her being examined separately, and consenting.

July 21, 1831.

IN this case, a young lady, a ward of the court, had married, when she was between twenty and twenty-one years of age, with the consent of her father, but without the consent of the court. Prior to her marriage, a settlement had been made of the funds in the cause to which she was

* On the 22d of May, 1833, the Lord Chancellor affirmed the above decree.

That Courts of Equity will give effect to contracts respecting possibilities or expectancies, see Beckley *v.* Newland, 2 P. W. 182; Wethered *v.* Wethered, 2 Sim. 183; Harwood *v.* Tooke, Ibid. 192.

entitled; and, after she attained twenty-one, she and her husband presented a petition in the cause, praying that the funds might be transferred to the trustees of the settlement.

Upon the hearing of this petition, it was said that it ought to be referred to the Master, to inquire whether the settlement was a proper settlement; and Long *v.* Long, 2 Sim. & Stu. 119; and Austen *v.* Halsey, Ibid. 123, note, were referred to.

But the Vice-Chancellor refused to make any reference to the Master, and directed that, upon the lady being examined, separately from her husband, either in court or under a commission, and consenting, the funds should be transferred to the trustees of the settlement.

A commission was issued accordingly; and the lady having been examined and consenting, the funds were, on the 19th of August, 1831, ordered to be transferred to the trustees.

Mr. Koe and Mr. Sidebottom appeared for the parties.

Davis *v.* Johnston.

4 *Simons*, 539.

A part owner of a ship, which had been let to the East India Company, for a voyage to India, after the other part owner had expended a large sum in repairing it, and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part-owner to give security for his share: the ship afterwards sailed to India, and returned home: Held, that the part-owner who had taken the security, was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs and outfit.

July 28, 1831.

THE bill stated that, in 1812, James Davis, the late father of the plaintiff, and the defendant became joint owners of a ship called "The Richmond," James Davis being entitled to one-third, and the defendant to the other two-thirds: that, on the death of James Davis, the plaintiff, as his personal representative, became entitled to his one-third part: that, during the whole period of such joint ownership, both in J. Davis's lifetime and since, the defendant had acted, exclusively, as the ship's husband and managing part-owner, with the consent of the other owner: that, between 1812 and the time of filing the bill, the ship had performed six voyages, and that, from time to time after the conclusion of the five first voyages, the defendant had paid, to the plaintiff, and to J. Davis in his lifetime, some moneys on account of the gains of the ship on the different voyages, but that, after the conclusion of the sixth voyage (which was in December, 1819), although the gains on that voyage in the hands of the defendant amounted to 3065*l* 10*s*. 2*d*., he evaded, although the plaintiff had repeatedly applied to him for that purpose, to make any dividend or payment on account of the profits of such sixth voyage, under various excuses, until July, 1820, when the plaintiff, for the first time, discovered that the defendant had hired the ship to the East India Company, for a voyage to India, and had expended the whole profits of the sixth voyage

[Davis *v.* Johnston.—4 Sim. 539.]

in fitting the ship for her voyage to India. The bill further stated that, if the plaintiff had been previously apprised of the contract or charter-party for the voyage to India, he would, as a part-owner, have objected thereto, and would not have consented to the fitting the ship for such voyage at an expense so great as to exhaust the whole of the profits of the sixth voyage: that, having discovered the intended voyage to India in July, the plaintiff was under the necessity of arresting the ship, by process out of the Court of Admiralty, and thereby compelled the defendant to give security for the safe return of the ship: that, having so arrested the ship, the plaintiff was excluded from all benefit of the voyage to India, and that he ought not to be charged with any part of the expense of the outfit for such voyage, but, on the contrary, ought to receive from the defendant, his, the plaintiff's, share of the profits of the sixth voyage, without any deduction whatever on account of such outfit. The bill prayed for an account of the defendant's receipts, payments and disbursements on account of the ship, since the plaintiff's father and the defendant became the owners thereof, and that the defendant might be compelled to pay, to the plaintiff, what should be found due to him on taking the account; and that the defendant might not be allowed to retain any part of the plaintiff's share of the profits of the sixth voyage, on account of the repairs or expenses of the outfit of the ship preparatory to her voyage to India.

The cause was heard, at the Rolls, on the 2d of December, 1822, when it was referred to the Master to take an account of all sums of money received, paid, laid out and expended, by the defendant, for or in respect of the ship and the several cargoes, freights, earnings and profits thereof, since James Davis and the defendant became the owners, with liberty to state special circumstances.

The Master reported that the defendant had received, for freight and earnings of the ship, sums to the amount of 52,952*l.* 0*s.* 3*d.*, and had paid and expended, in respect of the ship, 47,360*l.* 14*s.*, leaving a balance against the defendant of 5591*l.* 6*s.* 3*d.*: that the defendant had acted as managing owner with the consent of the plaintiff, and that the ship, having terminated her fifth voyage, in June, 1818, the defendant, as managing owner, engaged her on the sixth voyage, and expended all the profits of the fifth voyage in the outfit for the sixth; and that, on the return of the ship from the last-mentioned voyage, in December, 1819, the defendant engaged her for the seventh voyage, by charter-party with the East India Company, dated the 19th of January, 1820, by which it was stipulated that various heavy and substantial permanent repairs should be done to the ship, and that she should be afloat on the 22d of May, 1820: that, for the purpose of putting the ship in fit condition to perform the voyage agreeably to the stipulation of the charter-party, it was necessary to do considerable repairs to her, and to supply her with stores and provisions, and to pay custom-house charges; and that, previous to the arrest of the ship, the defendant had properly caused to be done and supplied to the ship, out of the profits of the sixth voyage, and at his own expense, repairs, stores and provisions necessary for the ship and her intended voyage, to the amount, in the whole, of 3947*l.* 6*s.* 8*d.*, and which the Master allowed the defendant in taking the account directed by the decree. And the Master found that the repairs and stores were of a substantial and permanent nature, and that the same were not exhausted or worn out by or on the seventh voyage, but, on the contrary,

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that the ship was very materially increased in value thereby, and that she had the use and benefit of them upon the subsequent eighth voyage. The Master further stated that the plaintiff was fully aware of the negotiation for the charter-party, and of the execution thereof, and of the doing of the repairs and supplying the stores and provisions, and fully acquiesced therein; and that, at different times between the months of January and June, 1820, both inclusive, the plaintiff pressed the defendant to pay him one-third of the profits of the sixth voyage, but which the defendant refused, because the whole and more would be necessary to pay the expenses of the repairs and outfit for the seventh voyage: that all the repairs, stores, provisions and custom-house expenses having been completed and paid, and the ship being upon the point of sailing under the stipulations of the charter-party, the plaintiff, on the 16th of June, 1820, made an affidavit, before the judge of the Admiralty Court, that he was dissatisfied with the conduct of the defendant in the management of the ship, and that it was necessary, for the security of his one-third part, that the defendant should give security for the safe return of the ship, to the amount of 2500*l.*, the value (as the plaintiff swore) of such one-third part: that, accordingly, a warrant issued out of the said court, for arresting the ship, which was detained until the defendant gave bail, to the plaintiff, to the amount of 2500*l.*, for the safe return of the ship: that, by the maritime law, and the rules and practice of the Court of Admiralty, in case the ship had been lost on her voyage, or in any other way prevented from returning to the port of London, the defendant and his bail would have been compelled to pay the 2500*l.* to the plaintiff, without further inquiry as to the value of his share: that, at the time of the arrest, the 2500*l.* was the full value of the plaintiff's share, including the repairs, stores, provisions and expenses, and much more than the previous value thereof, as the value of the whole ship, previous to such repairs, &c., did not exceed 3500*l.*: that, by the rules and practice of the Admiralty Court, it is necessary, in all cases of arrest, for the defendants to give bail for the sum sworn to by the plaintiff, or else for a commission of valuation to be issued out of that court, and that, upon such valuation, the value of the ship is taken, according to the state of it at the time of the arrest, with all the repairs, stores and provisions that may, at the time, have been done or supplied to her.

The defendant excepted to the report on the ground that the Master had charged him with the sum of 9608*l.*, being the freight paid to him for the seventh voyage: and because the Master, by so charging the defendant, had found, on the general account directed by the decree, a balance of 5591*l.* 6*s.* 3*d.*, to be due from him; whereas he ought to have found 1834*l.* 14*s.* 6*d.*, to be due to him, as would have been the state of the account if the Master had (as the defendant contended he ought to have done) excluded the 9608*l.*, received for freight of the seventh voyage, from the account.

The cause having come on to be heard on the exceptions, and for further directions,

Sir Edward Sugden and Mr. Gambier for the plaintiff, said that the defendant was precluded from entering into any discussion as to the plaintiff being excluded from his share of the profits of the seventh voyage, by the terms of the decree, which directed the account of all the voyages made by the ship to be taken generally.

The Vice-Chancellor, after hearing Mr. Knight and Mr. J. Martin for

the defendant, allowed the objection, but ordered that the cause should stand over to enable the defendant to have it reheard, and the decree qualified by inserting in it a reservation of the question as to the seventh voyage.

The cause was, accordingly, reheard at the Rolls, when the Master of the Rolls declared that the account directed by the decree, was to be without prejudice to any question between the parties as to the right of the plaintiff to a share of the freight and earnings of the ship in respect of the seventh voyage, and as to the liability of the plaintiff to contribute, as a part-owner, to the disbursements on account of the ship, between the termination of the sixth voyage, and the arrest of the ship by the plaintiff.

The cause having come on again on the exceptions, and for further directions, it was contended by

Mr. Knight and Mr. J. Martin, for the defendant, in support of the exceptions, that the plaintiff was excluded from all participation in the profits of the seventh voyage, by having arrested the ship, and thereby obtained security for the payment of the full value of his share, in case she did not return to the port of London; and that the plaintiff had so admitted by his bill, which stated that, by the arrest, he gave up or was excluded from any share of profit from the voyage then in contemplation: that, although the plaintiff was so excluded, still he was bound to pay his proportion of the expenses of the voyage incurred previous and up to the time of the arrest, by reason of the whole of those expenses, or the benefit thereof, being included in the sum for which the defendant was compelled to give security, to the plaintiff, in the Admiralty Court.

Mr. Gambier, for the plaintiff, referred to the case of the ship "Apollo," 1 Hagg. Adm. Reports, 306.

The Vice-Chancellor declared that the plaintiff having taken security for the value of his share, was not entitled to participate in the profits of the seventh voyage, but was to be charged with his share of the outfit and repairs of the ship incurred previous and up to the time of the arrest. And it was referred back to the Master to review his report.

Grinnell *v.* Cobbold.

4 *Simons*, 546.

An action having been brought against the plaintiffs, whose witnesses were about to leave England for New York, they applied to the Chief Justice of the King's Bench, under 1 Wil. 4. c. 22, for a commission to examine their witnesses before the trial. But his lordship ordered them to be examined *vivâ voce* before a gentleman of the bar, with liberty to the defendants to attend and cross-examine them. The plaintiffs took no proceedings under that order, but their witnesses having shortly afterwards gone to New York, they filed a bill in this court, and afterwards moved for a commission to examine their witnesses there: motion granted.

July 30, 1831.

THE plaintiffs were the owners of an American packet called the Columbia, which sailed regularly from New York to London and back,

[Grinnell *v.* Cobbold.—4 Sim. 546.]

on certain fixed days. The defendants were the owners of a British ship called the Betsy. On the 21st of February, 1831, the Columbia ran down the Betsy off the Sussex coast; and, on the 5th of March following, the defendants brought an action, in the Court of King's Bench, against the plaintiffs, for the loss of their ship. The plaintiffs pleaded not guilty, whereupon issue was joined; and, on the 10th of May, 1831, the issue was delivered, with notice of trial for the first sittings in the then next term, but, owing to the press of business, the cause could not then be tried; and, with the consent of the attorneys on both sides, the cause was appointed for trial on the 31st of October, 1831, at which time it was expected that the Columbia would be in England. On the 9th of July, 1831, the Columbia being then in England, and the plaintiffs wishing to have some of the crew, whom they considered to be material witnesses on their part, examined before the trial, under 1 Wil. 4. c. 22,* obtained a summons, from the Chief Justice of the King's Bench, ordering the defendants' attorney to attend him on the 12th of July, 1831, and show cause why the plaintiffs should not be at liberty to examine witnesses in the action. The attorneys on both sides attended accordingly; when the plaintiffs' attorney urged that the witnesses should be examined on interrogatories; but his lordship ordered that they should be examined *vivâ voce*, before a gentleman of the bar, with liberty for the defendants' attorney to attend and cross examine them. The plaintiffs, however, took no proceedings under that order; but, on the 14th of July, 1831, they filed the bill in this cause, stating that certain persons who were on board the Columbia when the two ships came in contact, were then in England, and that they, or some of them, were expected to be, shortly, at New York, and would not be in England at the trial of the action: that the evidence of the persons aforesaid was necessary for the defence of the plaintiffs to the action: that divers other persons were at New York, and elsewhere abroad, whose evidence would be material to the plaintiffs upon the trial of the action, and who would be able to prove the value of the Columbia. 53 Geo. 3. c. 159, s. 1. The bill prayed for a discovery and a commission to examine, *de bene esse*, the persons who were on board the Columbia, when the two ships came in contact, and who were then in England, and for commissions to examine witnesses at New York and elsewhere abroad, in order that the plaintiffs might have the benefit of their testimony at the trial; and that the defendants might be restrained from proceeding with the action.

* By sect. 4 of that act, it is enacted, "That it shall be lawful to and for each of the said courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the Master or Prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and, by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending, as without, and all other measures and circumstances connected with such examination as may appear reasonable and just."

[Grinnell *v.* Cobbold.—4 Sim. 546.]

The defendants, in their answer, which was filed on the 22d of July, 1831, said that the Columbia was expected to sail, shortly, for New York, but that she was expected to return to England before the trial, and that if, by any accident, she should not have then arrived, and any of the plaintiffs' witnesses should be absent on that account, the trial would be postponed, if the Chief Justice should so direct; and that they did not believe that any of the persons who were on board the Columbia, when the two ships came in contact, would be out of England at the trial, unless the plaintiffs should omit to bring back any of the crew; that, though there might be persons at New York or elsewhere abroad who might be able to give evidence as to the value of the packet, yet their evidence was not material to the plaintiffs, because the packet was, at that time, and had been, frequently before, in England, and was expected to return to England before the trial, and had been repaired by English shipwrights, and seen by merchants, shipowners, shipwrights and other persons resident in England, and able to depose to the value thereof: that the plaintiffs, if they deemed evidence of the value of the packet to be material, ought to have it valued before it sailed from England, by competent persons, who might give evidence of the value, at the trial: that the plaintiffs were not entitled to examine the persons alleged to be in this country, *de bene esse*, except under the Chief Justice's order; and that they were not entitled to have a commission for the examination of their alleged witnesses abroad, such examination being, for the reasons aforesaid, wholly unnecessary; that, if the plaintiffs had conceived such examination to be material, they might and ought to have applied to the Chief Justice for that purpose, but that they never stated, before filing their bill, that they desired any examination of witnesses abroad, and, if they had desired it, and taken steps for that purpose, in reasonable time, such examination would have been completed before the time fixed for the trial, but, if it were now allowed, it would delay the trial.

The plaintiffs now moved for a commission to examine witnesses at New York. The motion was supported by the affidavit of one of the plaintiffs, who was the captain of the packet. He deposed that the persons who composed the crew, at the time of the accident, were necessary witnesses for the plaintiffs: that those persons returned, with the Columbia, to New York, after the accident; and, on the 23d of June, 1831, again arrived by her in England: that the deponent, previous to his sailing for New York in March, 1831, had arranged, with his attorney, that the action should, if practicable, be tried on the return of the Columbia to England, which, in the ordinary course of her navigation, would be in the latter end of June, 1831, at which time the courts would be sitting at Nisi Prius: that, on his arrival in London, in June, he called on his attorney and stated that he was then ready to go to trial; and that his attorney, together with the defendant's attorney, applied to the Chief Justice to fix the trial for the day next after the then sittings, but that, owing to the number of previous causes, and to the circuit, the trial could not then take place: that the attorneys on both sides again applied to the Chief Justice to appoint, with consent of all parties, some day at the end of October for the trial; but, counsel not being able to attend at that time, it was proposed that the trial should take place during Michaelmas Term, provided proper arrangements could be made for that purpose: that the time fixed for the return of the packet to New York, was the 25th of November, and great inconvenience would arise from its being detained

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after that day: that the deponent was informed and believed that, according to the usual course of the King's Bench, the trial could not take place until after the 25th of November, though the plaintiffs were anxious that it should take place as early as possible: that he had brought back all the persons who composed his crew when the accident happened, that they might be examined in person; and that he and the other plaintiffs would use all the means in their power to bring the same persons back again; but that it might be impossible to bring back the whole of them, because it was usual for many of the sailors to leave the ship, at the end of each voyage; and because they might be lost or dispersed in the course of navigation.

Mr. Knight and Mr. G. Richards, for the plaintiffs, now moved for a commission to examine witnesses at New York. They said that the 1 Will. 4. c. 22, did not take away the jurisdiction of this court to grant commissions to examine witnesses abroad: that, if the commission were returned in time, the plaintiffs would have the benefit of it, but, if not, they would be forced to go to trial without any evidence at all: that the plaintiffs were ready to go to trial when the witnesses were in England, but that the course of the business in the Court of King's Bench would not allow of it: that the crew were hired for a single voyage only, and frequently ceased to renew their engagements: that they could not be detained without breaking in upon the arrangements for conducting the trade between London and New York, which was carried on by means of the line of packets, which had regular times for going and returning: that, though some of the seamen might probably return to England, there was no ground for expecting that the passengers who were on board when the accident happened, would be ever again in this country.

Mr. Pepys and Mr. Jacob, for the defendants, said that as the Chief Justice of the King's Bench had decided, upon a summons which had been obtained by the plaintiffs themselves, that the witnesses ought to be examined *vivâ voce*, the plaintiffs were precluded from applying to this court for a commission, which could not be granted except on the ground that the Chief Justice had miscarried: that the seamen were under the control of the plaintiffs, who had sent them abroad in order to prevent their being examined *vivâ voce*, and that, if the motion were refused, the plaintiffs would, immediately, bring them back; and, if the seamen should not be in England when the action was to be tried, the Court of King's Bench would postpone the trial: that the plaintiffs had been guilty of delay, as the action was commenced in March, but the bill was not filed till the 14th of July: that, in Hart *v.* Strong, 2 Russ. 559, a motion like the present was refused on the ground of delay only, though no injunction was asked for: that the value of the packet was immaterial, as the act of parliament,* which limits the liability of captains to the value of their ships, applied to British ships only; and that, at all events, the value of the ship must be ascertained, not at New York, but in London, where the action was to be tried.

The Vice-Chancellor:—The motion, in this case, does not seek to stay the proceedings at law.

It is stated that a similar application was refused by the Chief Justice of the King's Bench; and that his lordship ordered that the witnesses

* 53 Geo. 3. c. 159; and see Abbott on Shipping, 573.

should be examined, *vivâ voce*, in this country: but, as I do not know the grounds on which his lordship proceeded, I am bound to exercise my own discretion, upon the subject of this motion; for it is quite clear that this court is not deprived of its jurisdiction to grant commissions.

The captain of the packet states, in his affidavit, that it is customary for some of the sailors to leave the ship at the end of every voyage: and, therefore, they may not re-appear in this country. With respect to the passengers, it is not pretended that the captain has any control over them, and they may be as capable as the crew of giving important evidence at the trial. I think, therefore, that this is clearly a case in which a commission ought to be granted.

Order that the plaintiffs be at liberty to take out a commission for the examination of their witnesses at New York, returnable without delay.

The defendants afterwards moved the Lord Chancellor to discharge the above order: but his lordship refused the motion, and ordered that the commission should issue as directed by the Vice-Chancellor, the plaintiffs undertaking to pay the costs of the application made by them to the Chief Justice of the King's Bench, and to abandon the order pronounced thereupon.

Gibbs *v.* Payne.

4 *Simons*, 554.

IF the Master does not decide, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, unless by consent.

December 9, 1833.

Simeon *v.* Simeon.

4 *Simons*, 555.

A power over personal property was required to be executed by a will *signed and published in the presence of*, and attested by two witnesses. The donee professed to exercise the power by a will which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign it in their presence, and the witnesses, at different times, signed an attestation that the testatrix had signed and delivered the will, in their presence: Held, that though delivery was equivalent to publication, the power was not well exercised.

July 29, 1831.

THE late Sir John Simeon, by his will, dated the 27th January, 1824, after reciting that, by the settlement on his marriage with his wife, Dame Rebecca Simeon, she would, in the event of her surviving him, become

entitled, for her life, to the dividends of 15,279*l.* stock, then standing in the names of the trustees of the settlement, and that he was desirous of securing to her, for her life, a clear income of 2000*l.* per annum, bequeathed, to the trustees of his will, so much of the stock belonging to him at his death, the dividends whereof, with the dividends of the 15,279*l.* stock, would make up the clear annual sum of 2000*l.*; and he directed his trustees to pay the same to his wife; and that, after her death, the stock so directed to be appropriated for her benefit, should, subject to the power thereinafter given to her to dispose of a part thereof, sink into his residuary personal estate. Provided always that it should be lawful for his said wife, by her last will and testament in writing, or any codicil or codicils thereto, to be respectively *signed and published by her in the presence of, and to be attested by two or more credible witnesses,* to give, bequeath and dispose of the sum of 3000*l.* sterling, to be charged and chargeable upon, and raised and paid out of the stocks, funds or securities which should be appropriated for her benefit, as thereinbefore was directed.

Sir John Simeon died in February, 1824.

Lady Simeon, by her will, dated the 15th of June, 1830, (which was in her own hand-writing, *and signed by her,*) expressed herself as follows: "I leave the 3000*l.* I am entitled to dispose of by my late husband's will, as follows: to my daughter Mrs. Webber Smith, 1000*l.* &c."

The attestation clause to Lady Simeon's will was in the following words: "Signed and *delivered* in the presence of Sarah Bayley, Augusta Stanley."

An amicable bill was filed, by the appointees of the 3000*l.* against the residuary legatees under Sir John Simeon's will, praying that Lady Simeon's will might be declared to be a valid execution of the power given to her by her late husband's will.

Augusta Stanley, who was examined for the plaintiffs, deposed that, on the 28th of June, 1830, (no one being present but herself and the testatrix,) Lady Simeon requested her to be a witness to her will, and then produced the will, which was already signed by the testatrix, and said: "This is my will: I have signed it already, and Miss Bayley has witnessed it:" and the witness then signed the will in the testatrix's presence: that she was well acquainted with the testatrix's hand-writing, and believed the body of the will and the signature to it to be in the testatrix's hand-writing. Sarah Bayley, who was also examined for the plaintiffs, deposed that, about the middle of June, 1830, she went to visit the testatrix, who produced a paper writing, and said: "This is my will: will you put your name to it?" and then gave the will to the witness, to sign her name to it: that the testatrix, soon afterwards, said to her: "I declare to you that this is my will," and then the witness signed her name to it: that the will was not signed, by the testatrix, in the presence of the witness, but that the same had then been already signed: that she was not acquainted with the testatrix's hand-writing: and that no person, except herself and the testatrix, was present when she signed her name, and that no person had previously subscribed the will, as a witness.

The cause now came on to be heard as a short cause.

Sir E. Sugden and Mr. Phillimore for the plaintiffs:

1st. Sir John Simeon's will required the power to be exercised by a will signed and published. The attestation clause to Lady Simeon's will,

expresses that it was signed and delivered. There is no particular efficacy in publication: it is only an acknowledgment that the instrument is the will of the testator or testatrix. Delivery of a will, *quà* will, is a publication. In Moodie *v.* Reid, 1 Madd. 516; 7 Taunt. 355, the signing only was attested: there was nothing in the attestation clause that was tantamount to publication: and the Court of Common Pleas held that the power was not well executed.

2d. It is of no importance that the two witnesses attested the will at different times. 3d. The whole of the will was in Lady Simeon's own hand-writing: and, as she acknowledged the signature in the presence of the witnesses, she did what was equivalent to signing in their presence. 4th. If the court should hold that the power was not well executed, it will aid the execution in favour of the testatrix's children.

Mr. Beames, Mr. Girdlestone, jun., and Mr. James Russell, for the defendants:

The power was not duly executed. Delivery has reference to a deed, and is inapplicable to a will. Moodie *v.* Reid is an authority for the defendants.

[The Vice-Chancellor:—The delivery was equivalent to publication.]

It is manifest, from the evidence, that the witnesses attested the will at different times, and that neither of them was present when it was signed by the testatrix. Stanhope *v.* Keir, 2 Sim. & Stu. 37; Jones *v.* Dale, Sug. Treat. Powers, 5th edit. 242, 243. In this last case, Reynolds, J. said: "Saying and doing a thing is not the same thing; and his saying he had writ it himself won't amount to a subscribing in the presence of three witnesses, as the power requires." That case is precisely in point.

The Vice-Chancellor:—If there had been the requisite number of witnesses to Lady Simeon's will, it would have been duly executed under the statute of frauds; but it is clearly not a good execution of the power. The court, however, will aid the defective execution, so far as it extends to her children.

Sutton *v.* Lord Montfort.

4 *Simons*, 559.

Injunction granted to prevent the obstruction of ancient lights, against a lessee of an ecclesiastical corporation, subject to the plaintiffs establishing their right to the easement in an action.

August 1, 1831.

THE defendant, Lady Montfort, lived separate from the defendant, Lord Montfort, her husband, and occupied a house, with a court-yard or garden belonging to it, under a lease from the dean and chapter of Westminster. The court-yard or garden was thirty-four feet from north to south, and seventeen feet from west to east, and was bounded, on the

[Sutton *v.* Lord Montfort.—4 Sim. 559.]

west and north, by two of the sides of the house; on the east, by a dwarf party-wall, about seven feet high, and, on the south, by Piccadilly. On the east side of the dwarf party-wall was a passage running northward from Piccadilly, which was thirty-four feet from north to south, and ten feet from west to east, and was bounded on the west, by the dwarf party-wall, on the north, by the front wall of a house occupied by the plaintiff, Tutton, on the east, by the front wall of a house occupied by the plaintiff, Miss Jelfe, and, on the south, by Piccadilly. So that, but for the party-wall, the court-yard and passage would have formed, together, a clear, open, rectangular space, of thirty-four feet from north to south, and twenty-seven feet from east to west, and bounded, on the west, by one side of Lady Montfort's house, on the north, partly by another side of the same house, and, partly, by the front of Mr. Tutton's house (which two last-mentioned walls were in one continued line) on the east, by the front of Miss Jelfe's house, and on the south, by Piccadilly.

In May, 1831, Lady Montfort caused her house to be pulled down, and preparations to be made for building a new one, of the same height as the plaintiffs' houses, and on an enlarged site, covering a portion of the court-yard to the distance of fourteen feet from the eastern side of her former house, and to the extent of thirty-four feet from the north side of her former house, to Piccadilly, which was the whole length of the court-yard. Lady Montfort likewise intended to raise the dwarf party-wall to the height of fifteen feet.

If these alterations had been carried into effect, the eastern wall of the new house would have stood within thirteen feet of the houses occupied by Miss Jelfe and Mr. Tutton; and the access of light and air to their houses, would have been considerably impeded. Accordingly, Mr. Tutton and Miss Jelfe, together with their landlord, Sir Richard Sutton, filed a bill against Lord and Lady Montfort, stating that the plaintiffs' houses had been built upwards of sixty years: that Mr. Tutton's house had several ancient lights or windows looking towards Piccadilly, and, obliquely or diagonally, over the court-yard: that Miss Jelfe's house had several ancient lights or windows, all looking, directly, upon the court-yard: that the proposed erections, if carried into execution, would obscure and obstruct the plaintiffs' ancient lights, and would, by preventing the admission and circulation of light and air, make the occupation of their houses highly prejudicial to the health, comfort and enjoyment of the occupiers, and render their houses unfit for future habitation. The bill prayed for an injunction to restrain the defendants from erecting the intended, or any other buildings, by which the plaintiffs' ancient lights might be darkened or obscured, or the free admission of light and air be prevented or obstructed.

On the 28th of June, 1831, an injunction was obtained, *ex parte*, in the terms of the prayer. One of the affidavits in support of the bill, was made by Sir R. Sutton's surveyor, who deposed that, if the buildings were permitted to be carried on according to the proposed plans, the due circulation of air, in and to the plaintiffs' houses, would be most materially prevented and impeded, but more particularly in the ground and basement floors; and that the ancient lights or windows of the plaintiffs' houses would be thereby obstructed and darkened, to such a degree, that, particularly in the ground and basement floors, the rooms would be rendered nearly useless, and that artificial light would be required, during the winter months, to enable the residents in the same houses to make

use thereof: that no direct light would be admitted into part of the basement floors of the plaintiffs' houses, and, particularly, of Mr. Tutton's house, the ground floor of which appeared to have been constructed with a view to obtain the access of light, diagonally, across the court-yard; and that, by building over the court-yard, in the way proposed, the access of the light acquired by the aforesaid construction, would be entirely prevented.

By another of the affidavits, it appeared that, in August, 1822, Lady Montfort was proceeding to raise the dwarf wall, but, on being served with a notice, on behalf of Sir Richard Sutton, she desisted.

Lady Montfort having put in her answer, now moved to dissolve the injunction.

Mr. Pepys and Mr. J. Romilly, in support of the motion, said that Lady Montfort's house belonged to the dean and chapter of Westminster, who were incapable of granting an easement, or dealing with their property, in any manner, so as to prejudice their successors: that no grant could be presumed against a body who were incapable of making it. Barker *v.* Richardson, 4 Barn. & Ald. 579; Daniel *v.* North, 11 East, 372; that this court would not interfere in every case of darkening ancient lights, which would entitle a party to a verdict in an action, but only in cases where the injury might be irreparable, as where loss of health, loss of trade, or destruction of the means of existence might ensue. Attorney-General *v.* Nichol, 16 Ves. 338; Wynstanley *v.* Lee, 2 Swanst. 333; that the present case was precisely parallel to Wynstanley *v.* Lee, both as the absence of legal right in the plaintiff, and the extent of the injury complained of: that this case was even stronger than Wynstanley *v.* Lee; because, there, the existence of the legal right was doubtful, but here, it clearly did not exist: that, if there were any pretence of legal right, this court would not adjudicate upon it, in a question of nuisance.

Mr. Knight, Mr. Stuart and Mr. W. C. Macdougall, for the plaintiffs, said that it did not appear when or how the dean and chapter first acquired their title to the defendant's house: that they might have acquired it only a few years ago: that it was conceded, in Barker v. Richardson, that there might be a good right to the easement, as against the rector, though not as against his successors; so the plaintiffs, in this case, might have a good title to the enjoyment of their ancient lights, against the lessee, though not as against the reversioner.

The Vice-Chancellor:—In the case of the Attorney-General *v.* Nichol, Lord Eldon, in speaking of the sort of mischief against which this court interposes, by injunction, says: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief alluded to by Lord Hardwicke; that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law." 16 Ves. 342. So that, first of all, we have to consider whether, if this building were raised in the manner in which it is represented that Lady Montfort intends to raise it, it would not be a material injury to the comfort of those who live in the neighbouring houses. Now, so far as the model* gives me any information upon the subject, and so far as I can form a

* A model of the premises was produced at the hearing of the motion.

[Sutton *v.* Lord Montfort.—4 Sim. 559.]

conception from the dimensions of the intended building, as they have been stated in the affidavits, I entertain no doubt, whatever, that the comfort of those who live in the houses now occupied by Mr. Tutton and Miss Jelfe, would be most materially affected by the raising of the new building in the manner proposed. And, though it may be true that the church cannot grant rights to the prejudice of their successors, yet it should be recollected, with respect to nuisances, that the right which a man has in his own property, is materially affected by the manner in which the owners of the adjoining property have dealt with their property. Because, if there are several fields belonging to different owners, A., B. and C., as long as they remained open fields, B. and C., could not complain that A. had erected, in his open field, a manufactory for grinding bones or making soap. But, put the case that B. and C. had erected buildings and raised a town upon their fields: I apprehend that then there would be very little difficulty in saying that, upon a piece of land immediately contiguous to and in front of those houses, though it might belong to the church or to the crown, the fact of building a manufactory for grinding bones or making soap, would be quite sufficient to induce a jury to hold it to be a nuisance. Therefore, it does not follow, because the dean and chapter of Westminster cannot injure their successors, that the circumstance of houses having been built on the adjoining land, may not, of itself, operate as a reason, at law, why the dean and chapter should have the right to erect the buildings in question: and whatever would apply as a reason against the church or the crown, would apply, with more strength, against a lessee; because a lessee might be more affected by personal knowledge of what was done by the party owning the adjoining property.

Now, in this particular case, it appears to me, on the evidence as it is now before me, that, in the year 1822, Lady Montfort did, for some reason or other, yield to that claim of right on the part of the plaintiff Sir R. Sutton, which is represented upon the affidavits: and that, I think, is not an inconsiderable circumstance, when I am to determine the question whether the injunction is to be continued or not.

I have, therefore, a case before me, in which, according to my own opinion, upon the simple question of nuisance, the building, if completed, would be a nuisance, and in which it is not, by any means, clear that the dean and chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montfort may not have the right, though the dean and chapter may have it. I think, therefore, that the injunction should be continued, though the matter must be tried.

The defendant, Lady Montfort, by her counsel, undertaking, on the trial of the action hereafter directed, not to set up her coverture, or any outstanding legal estate, and to admit that the house had been built by her, according to the model now produced in court, let the plaintiffs be at liberty to bring such action as they shall be advised; and let the injunction be continued until the further order of the court.

Blanchard *v.* Cawthorne.

4 *Simons*, 566.

RECEIVER granted, at the suit of a judgment creditor, of the office of master forester of a royal forest.

August 9, 1831.

Bosanquet *v.* Marsham.

4 *Simons*, 573.

If a general demurrer is overruled, but leave is given to amend, and the bill is amended by adding a party merely; the defendant may, nevertheless, put in a general demurrer to the amended bill.

October 31, 1831.

A GENERAL demurrer to the bill having been overruled on argument, the defendant demurred, *ore tenus*, for want of parties, and that demurrer was allowed: but leave to amend was given to the plaintiff. He amended, accordingly, by adding a party and charging him to be out of the jurisdiction; but the case made, and the relief prayed, remained the same as before. The defendant then put in a general demurrer to the amended bill.

Mr. Pepys and Mr. O. Anderdon, for the plaintiff, now moved that that demurrer might be taken off the file, for irregularity. They said that a party could not demur twice to the same matter, Mitf. Plead. 14 & 176, 3d edit.: that the amended bill was the same as the original bill, except that the defect in the latter had been remedied, and that the same question was to be raised on the second demurrer, as had been raised on the first.

Sir E. Sugden, and Mr. Barber, for the plaintiff.

The Vice-Chancellor said that, if, after a defendant had answered a bill, any amendment, however trifling, were made in it, it would be competent to the defendant to put in another answer, and to make an entirely new defence; and that he thought that the same rule applied to a demurrer.

Newton *v.* The Earl of Egmont.

4 *Simons*, 574.

A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. & C. his sureties, in a covenant to pay an annuity to the plaintiff, and A. covenanted that if he should survive his father, he would create a term in the estate, for securing the annuity. A.'s father died: and A. granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself and the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A., the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand for which he should not be entitled to priority over the trust-deed: Held, on demurrer, that the sureties were not, but that all the creditors who had executed the deed were, necessary parties; and that, as the bill alleged that the trust-deed had been executed by several of the creditors, the objection was properly made by demurrer.

If on a demurrer, *ore tenus*, for want of parties, the plaintiff wishes to have permission to amend his bill more extensively than by merely adding parties, he must pay the costs of the demurrer.

November 3, 1831.

BY indentures of lease and release, dated the 17th and 18th of January, 1791, certain manors and other hereditaments in Somersetshire were settled to the use of John James, Earl of Egmont, the defendant's late father, for life, with remainder to such uses as the late earl and defendant, should, during their joint lives, appoint, with remainder to such uses as the defendant, in case he should survive his father, should appoint, with remainder to the defendant, for life, with remainder to trustees to preserve contingent remainders, with remainders to the defendant's first and other sons, successively, in tail male, with remainder to the late earl in fee. By an indenture of the 24th of February, 1817, (the late earl being then living,) the defendant, together with the Honourable Henry Perceval, his only son, and Thomas Wynn Bellasyse, Esq., as sureties, covenanted, for themselves, their heirs, executors, and administrators, with the plaintiff, to pay to him an annuity of 776*l.*, during the life of Lady Charlotte Wynn Bellasyse: and the defendant and his son demised the Somersetshire estates to J. R. Griffin, from the day of the death of the late earl, if either the defendant, or his son, should be then living, for ninety-nine years, determinable on the decease of Lady C. W. Bellasyse, upon trust, in case the annuity should be in arrear for ten days, out of the rents, or by mortgaging or selling the estates for the term, to raise and pay such arrears to the plaintiff, and to pay the surplus (if any) of the money raised, to the person or persons, for the time being, seised of the freehold or inheritance of the estates. And the defendant and his

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son, for themselves, their heirs, &c. severally covenanted with the plaintiff, that, if they or either of them should survive the late earl, then, immediately after his death, they or the survivor would appoint or demise the estates to Griffin, or to such other trustee as the plaintiff should appoint, for one thousand years from the day of the late earl's decease, upon the trusts declared of the term of ninety-nine years, and, subject thereto, in trust for the person or persons entitled to the freehold and inheritance of the estates expectant upon the term of one thousand years: and, if any part of the annuity should be in arrear for three months, Griffin was empowered to sell the estates thereinbefore demised; and it was declared that he should stand possessed of the proceeds upon trust, after retaining his expenses and paying the arrears, to invest the residue in the usual securities, and apply the interest thereof, and the principal, if necessary, in payment of the annuity, as it should, from time to time, become due, and, when the annuity should have ceased, and all the arrears thereof should have been paid, to assign the residue of the securities to the persons then entitled to the estates, subject to the security intended to be thereby made.

By an indenture of the 12th of March, 1822 (the defendant's father being then dead), the defendant and his son, in consideration of 2850*l.* paid to the defendant, and of 1148*l.* due for arrears of the annuity of 776*l.* granted, to the plaintiff, an annuity of 399*l.* 16*s.*, for one hundred years, if the defendant, his son, and the plaintiff, or any of them should so long live: and the defendant appointed, and he and his son, by way of further assurance only, demised the Somersetshire estates, together with other property, to Griffin, for nine hundred and ninety-nine years, upon certain trusts for securing the last-mentioned annuity; and the plaintiff released T. W. Bellasyse, Lady C. W. Bellasyse, the defendant and his son from the 1148*l.** On the 29th of November, 1822, both the annuities being in arrear, the defendant and his son, in consideration of those arrears and of a sum paid to the defendant, executed to the plaintiff, a bond for securing to him an annuity of 178*l.* 15*s.* 6*d.*, if the defendant, his son, and William Newton the younger should so long live; and, for further securing the same annuity, the defendant and his son executed a warrant of attorney, upon which judgment was entered up in Trinity Term, 1823.

On the 5th of May, 1825, Lady C. W. Bellasyse died; and 2087*l.* 15*s.* 2*d.* were then due for the unsatisfied arrears of the annuity of 776*l.*: and those arrears, and also certain arrears of the two other annuities, which were still subsisting, remained due when the bill was filed.

Griffin having died, by an indenture of the 17th of January, 1831, the remainder of the term of nine hundred and ninety-nine years was assigned to John Goren, upon the subsisting trusts of the deed of the 12th March, 1822.

The bill which was filed, in February, 1831, against John Earl of Egmont, Henry Viscount Perceval, his son, (who was out of the jurisdiction), James Goren, John Godfrey Teed, Henry Cowd Teed, Edward Tierney, Henry Hugh Hoare, Charles Hoare, Henry Merrick Hoare and John Wain, after stating to the effect before-mentioned, alleged that, by indentures of lease and release of the 1st and 2d of November, 1824,

* The statement of the instruments contained in this case was correctly taken from one of the briefs.

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the release being expressed to be made between Lord Egmont of the first part, the several persons whose names should be set down in the first schedule thereto annexed, and who should execute the deed, being creditors of Lord Egmont for gross sums of money, or being annuitants entitled to annual sums granted by him, and which gross and annual sums were respectively secured by judgments affecting the hereditaments thereinafter appointed and conveyed, of the second part; the several persons whose names should be set down in the second schedule thereto annexed who should execute the deed, being creditors of Lord Egmont, for gross sums of money, or annuitants entitled to annual sums, and which gross and annual sums were legally or equitably charged upon the hereditaments thereby appointed and conveyed, by virtue of securities not consisting, exclusively, of judgments, of the third part, Viscount Perceval, of the fourth part, Viscount Perceval, John Godfrey Teed, and Edward Tierney, of the fifth part; and Henry Cowd Teed of the sixth part; the estates comprised in the deed of February, 1817, together with other estates, were appointed and conveyed, by Lord Egmont and Viscount Perceval, unto and to the use of Viscount Perceval, John Godfrey Teed, and Edward Tierney, their heirs and assigns, upon certain trusts for the benefit of the creditors of Lord Egmont; and the judgments obtained by the several creditors executing the release, were assigned to Henry Cowd Teed, in trust for more effectually carrying the trusts of the release into execution. The bill further alleged that the last-mentioned indenture of release *was executed by various creditors of the said John Earl of Egmont*, and, amongst the rest, by John Wain: that, some time since, Wain, on behalf of himself and all other the creditors of Lord Egmont who were or should become entitled to the benefit of the trusts of the indentures of November, 1824, filed a bill, in this court, against Lord Egmont, Viscount Perceval, John Godfrey Teed and Edward Tierney, for the purpose of having the trusts of those deeds carried into execution: that, on the 14th of May, 1830, a decree was pronounced in the cause, whereby it was referred to the Master to take an account of the mortgage-debts and incumbrances charged upon and affecting the estates comprised in the deeds of November, 1824, and of the debentures granted by the defendants, the trustees, and of what was due to Wain and all other the creditor of Lord Egmont entitled to the benefit of the trusts of those deeds; and the Master was directed to inquire and state the dates of the said several mortgages, debentures and other securities, and the sums for which the same were given, and the particular premises therein comprised, and their respective priorities with regard to each other, and for which of the debts of Lord Egmont, Viscount Perceval was surety: and the Master was directed to advertise for the creditors of Lord Egmont under the trust-deeds, to come in before him and prove their debts, and to take an account of the trust estates, and of the rents thereof which had accrued and been received, by the trustees, since the date of the deeds of November, 1824: and it was ordered that what, on the taking of such account, should be found due from John Godfrey Teed and Edward Tierney, should be paid into the bank, to the credit of the cause; and that the receiver appointed in the cause, should be continued and pass his accounts before the Master, and that, out of the rents to be received by him, he should keep down the interests of the mortgage-debts and incumbrances charged upon and affect-

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ing the estates, according to their priorities, and pay his balances into court to the credit of the cause. The bill further stated that the Master had not made his general report in the suit instituted by Wain, and that the plaintiff was desirous of going in before the Master, in order to have the benefit of his aforesaid securities, under the decree in that suit; but that Lord Egmont and Viscount Perceval, John Godfrey Teed, Edward Tierney and Henry Cowd Teed, who claimed an interest in the said hereditaments and premises adverse to the plaintiff, acting in concert with Wain, and with the Messrs. Hoare, who were incumbrancers upon the hereditaments and premises comprised in the plaintiff's securities, refused to permit the plaintiff so to do; and that all the defendants pretended that the plaintiff was not entitled to the benefit of his securities; and, in particular, that he was not entitled to the benefit of the deed of February, 1817, but the plaintiff charged that he was entitled, under the covenant in that deed, to a lien or incumbrance, upon the estates therein comprised, to secure the arrears of the annuity of 776*l.* then due: that Wain and the Messrs. Hoare had notice of the plaintiff's securities, before their securities were executed: that the defendants pretended that there were other incumbrances upon the said hereditaments and premises, prior to the plaintiff's securities, and, under the circumstances aforesaid, the plaintiff was desirous that his rights under his securities, should be established under the decree of the court, he being willing to take the benefit of the trust-deeds, and of the decree establishing the same, for so much of what was due to him as aforesaid, and to which he might not be found to be entitled in priority to those deeds. The bill prayed for an account of what was due, to the plaintiff, under his securities, and that his rights and interests under the same might be established, and that the priorities of the plaintiff and the other incumbrancers might be declared, the plaintiff being willing to redeem such of the securities as should appear to be prior to his own, and that he might be at liberty to go in and take the benefit of the decree in Wain's suit, for what he should not be entitled to recover in priority of the trust-deeds; and that a receiver might be appointed of the rents of the trust premises, and that the trustees might be restrained from receiving those rents, and from paying away any of the trust-property then in their hands.

Lord Egmont demurred, generally, to this bill.

Sir E. Sugden and Mr. Blunt, in support of the demurrer, said that, under the decree in Wain's suit, the plaintiff might have all the benefit which he sought by his bill: that no other decree could be made in this suit: and that, therefore, he ought not to have filed a new bill, but ought to have gone in under the former decree, and, moreover, that he had submitted so to do by his bill. Jackson *v.* Leaf, 1 Jac. & Walk. 229; Anson *v.* Towgood, Madd. & Geld. 374.

The Vice-Chancellor said that the plaintiff had submitted to go in under the decree in Wain's suit, as to that part only of his demand which was subsequent to the deeds of November, 1824, and that he asked distinct relief as to that part of his claim which was superior to those deeds: that it was plain, on the face of the bill, that the plaintiff was entitled to relief which he could not have in the suit alluded to; besides, that the bill charged that the plaintiff was desirous of going in under the decree, but that the defendants refused to permit him so to do; and consequently that the demurrer must be overruled.

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The demurrer on the record having been overruled, Lord Egmont demurred, *ore tenus*, for want of parties.

Sir E. Sugden and Mr. Blunt for the defendant, Lord Egmont:

By the deed of February, 1817, Lord Egmont, and his son, Viscount Perceval, covenanted that, if they should survive the late earl, they would demise the estates comprised in that deed to a trustee, for the term of one thousand years, upon certain trusts for further securing the annuity thereby granted. That covenant remains to be performed; and the bill is filed by the plaintiff, claiming to be an equitable incumbrancer on the estates, in respect of that covenant. For the purposes of this demurrer, the suit instituted by Wain must be put, entirely, out of the question. The bill alleges that the release of 1824 was executed by various creditors of the defendant Lord Egmont. If that be so, how can Wain be brought here to answer the rights of all those creditors? Some of them, if they were to go in under the decree sought by this bill, might be contending parties with him as to his priority. He has not a common interest with the other creditors. He has, it is true, an interest with them in a common fund; but he may have an interest which is in direct opposition to the other creditors who have a claim upon the common fund.

Mr. Bellasyse, who was one of the sureties for the payment of the annuity of 776*l.*, is not a party upon this record. Viscount Perceval, the other surety, is named as a defendant, but is charged to be out of the jurisdiction of the court. There being large arrears of the annuity of 776*l.*, which the sureties are liable to pay, the court cannot grant the relief prayed by this bill, unless they are both before the court. Both of them ought to be present, in order to see that the priorities are properly settled. The rule is that, where an estate is vested in trustees for the benefit of creditors, all the *cestui que trusts* must be before the court, unless they are numerous, which they are not alleged to be in this case. Calverley *v.* Phelp, Madd. & Geld. 229.

Mr. Knight and Mr. Spence for the plaintiff, in support of the bill:

One of the objections made to this bill, is that Lord Perceval is made a party, but Mr. Bellasyse is not. Lord Perceval is not made a party as a surety under the deed of 1817, but as a joint owner of the estate, who has concurred in creating the incumbrance. Bellasyse has no interest in the estate; he merely joined in a personal covenant to pay the annuity. An incumbrancer may pursue his security on the land of the principal debtor, although another person may have joined, as a surety, in a personal security. Mr. Bellasyse's covenant is a mere personal obligation; in this suit we pursue the estate.

Next: The other objection, if it can be made at all, must be made by plea. The plaintiff is not a party to the trust-deed, and, therefore, he cannot know which of the creditors have executed it. There is nothing, on the face of the bill, to show that there is a single person having a claim on the estate, who has not executed the trust-deed. Is it then necessary to make all the persons who have executed that deed parties to this suit? In Calverley *v.* Phelp, the distinction is taken, in the judgment, that it was a bill of foreclosure, and not a trust for sale. Is it the rule of this court, that, where there is a general trust for creditors, they must all be

made parties to a suit? No priorities are reserved; but all the incumbrancers have merged their interests in a general trust, and they claim the benefit of the trust-deed, as a class. It is important to observe that a decree has been obtained in the other suit, which is now in prosecution: and both the deed and the decree show that the parties must be numerous; and the rule is that it is quite sufficient to select some or one of a class. Baldwin *v.* Lawrence, 2 Sim. & Stu. 18. How can the class be more effectually represented, than by the person who has obtained the decree in the other suit?

The Vice-Chancellor:—I remain of the opinion which I expressed with respect to the general demurrer, namely, that it cannot be sustained. The defendants have now demurred, *ore tenus*, because Mr. Bellasyse, the co-surety with Viscount Perceval in the deed of 1817, and the creditors who have executed the trust-deed of 1824, are not made parties to the bill. With respect to the first ground of objection, I do not think that Mr. Bellasyse is a necessary party, because it is not stated that he has any security on the estates, but only that he has entered into a personal covenant to pay the annuity granted by the deed of 1817. I think, however, that all the creditors who have executed the trust-deed, ought to be parties. The plaintiff has a specific incumbrance on the estates, under the covenant in the deed of 1817. In 1824 the trust-deed was executed. Creditors of two descriptions are parties to that deed, namely, creditors entitled to gross sums of money, and annuitants entitled to annual sums, and which gross and annual sums were secured by judgments affecting the estates; and creditors for gross sums, and annuitants entitled to annual sums, which gross and annual sums were legally or equitably charged upon the estates by virtue of securities not consisting, exclusively, of judgments: and it is stated, on the face of the bill, that the trust-deed was executed by various creditors of the defendant Lord Egmont; but only one of them is made a party. The plaintiff asks, by his bill, not only to have the benefit of the decree, in the former suit, but also that the priorities of the plaintiff and the incumbrancers on the estates, may be declared, and that he may be at liberty to redeem such of the securities as may appear to be prior to his security: now, how can the court ascertain the priorities between the plaintiff and the other persons who hold securities on these estates, unless those other persons are parties to the suit? My opinion is that all those creditors who have executed the release of 1824, ought to be parties to this suit; and, as the defect appears on the face of the bill, I think that advantage may be taken of the objection by demurrer. The consequence is, that the demurrer must be allowed; but I shall give leave to the plaintiff to amend his bill by adding parties.

Mr. Knight then asked for permission to amend the bill, more extensively than by merely adding parties, namely, by introducing certain allegations into it. But the Vice-Chancellor said, that if a plaintiff, upon a demurrer for want of parties being allowed, wished to amend his bill more extensively than by adding parties, he must pay the defendant the costs of the demurrer. Upon which Mr. Knight said that he would take permission to amend by adding parties only.

Frankland *v.* Lucas.

4 *Simons*, 586.

The court has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit.

November 5, 12, 1831.

BY an order made, in this cause, on an undertaking to speed, it was ordered that plaintiff should go to commission in the vacation following, give rules to pass publication in the next term, and set down his cause for hearing in the term after, and in default thereof, that his bill should be dismissed. The rules to pass publication not having been given within the time prescribed, the bill was dismissed with costs. The Vice-Chancellor and the Lord Chancellor were successively moved, on behalf of the plaintiff, to restore the cause, but, in both instances, the motion was refused with costs. The plaintiff then presented a petition, which was intituled both in the cause and in the matter of the solicitor, imputing the dismissal of the bill to the negligence of his solicitor in not taking, in due time, the proper step in the cause, after the undertaking to speed had been given, and praying that the solicitor might be ordered to repay him the costs on the dismissal of the bill, and also to pay the costs of the motions, when they should be taxed.

On the hearing of the petition, two questions were made: 1st, whether the solicitor was chargeable with negligence? 2d, if he was, whether this court had jurisdiction to make him responsible for it?

Sir E. Sugden and Mr. Knight, in arguing the second question for the petitioner, said that this was not a case of mere mistake, but of gross negligence and inattention on the part of the solicitor; and that there could be no doubt that, in such a case, the court had the jurisdiction contended for. Floyd *v.* Nangle, 3 Atk. 568; Fawkes *v.* Pratt, 1 P. W. 592.

Mr. Pepys, Mr. Girdlestone, jun. and Mr. Jas. Russell, for the solicitor, said that there was no instance in which the jurisdiction in question had been exercised, either by courts of equity, or by courts of law: that Lewis *v.* Nangle did not apply; and, besides, that that case contained an *obiter dictum* only, and that no order was made in it. Barker *v.* Butter, 2 Sir W. Black. 780; Ex parte Jones, Chitty's Rep. 651.

The Vice-Chancellor, after detailing the particulars of the case, said that he had no doubt that the solicitor had been guilty of negligence, but that as he did not recollect any case in which a similar application had been made to the court, he should direct the petition to stand over, in order that the question of jurisdiction might be further inquired into.

November 12.—The Vice-Chancellor said that, if the jurisdiction existed, there must have been various instances in which it had been exercised: that cases of gross negligence on the part of solicitors had frequently come before him, but he had never known an instance in which the jurisdiction had been exercised: that there had been very great neglect in the present case, and there was some semblance of authority for the petition, and that, therefore, he should make no order.

Earl Digby *v.* Howard.

4 *Simons*, 588.

The late duchess of N. being entitled to pin-money charged upon estates to which the duke was entitled for his life, became a lunatic in 1782, and continued so till 1820, when she died. The late duke received all the rents of the estates, and maintained the duchess according to her rank: Held, that as the duchess was incapable of consenting to, or acquiescing in the duke's retaining her pin-money, his estate was accountable for all the arrears of it.

November, 7, 8, 1831.

UPON the treaty for the marriage between Charles, late Duke of Norfolk, then the honourable Charles Howard, and Miss Frances Fitzroy Scudamore, it was agreed that estates situate in the counties of Hereford, Bucks, Gloucester, Monmouth and Surrey, the property of the lady, should be settled in the manner after-mentioned, and that she should retain 5000*l.* out of a sum of 25,000*l.* belonging to her, to purchase clothes, jewels, and other necessaries on the occasion of her marriage; and that Mr. Howard should enter into a covenant for limiting, to Miss Scudamore, 300*l.* per annum, for pin-money, out of a sufficient part of the estates which were then the property of Edward, then Duke of Norfolk, when he, Mr. Howard, should come into possession thereof by virtue of certain settlements and entails then subsisting thereof, and that a provision for the separate use of Miss Scudamore, in the nature of pin-money, should be made for her out of her own estates. Accordingly, by indentures of lease and release, dated the 22d and 23d of March, 1771, Miss Scudamore's estates were settled to the use that Charles Fitzroy Scudamore, her father, should receive thereout an annuity of 1000*l.* for his life, and to the further use that Charles Fitzroy and Samuel Lord Masham, and their heirs, might, during the joint lives of Mr. Howard, Miss Scudamore, and her father, receive, thereout, an annuity of 500*l.*, and, if Mr. Scudamore should die in the life-time of Mr. Howard and Miss Scudamore, then to the further use that Charles Fitzroy and Samuel Lord Masham, and their heirs, might receive thereout an annnity of 700*l.* in lieu of the annuity of 500*l.*; and subject to those three annuities, the same estates were settled to the use of trustees for the term of four hundred years, and, after the determination thereof, to the use of other trustees for the term of five hundred years, and, subject thereto, and charged as aforesaid to the use of Miss Scudamore for life, without impeachment of waste, and with power of leasing, with remainder to trustees to preserve contingent remainders, with remainder to Mr. Howard for life, without impeachment of waste, and with power of leasing, with remainder to trustees to preserve contingent remainders, with remainder to the sons of the marriage as therein-mentioned, with remainder to such uses as Miss Scudamore should appoint, with remainder to the heirs of her body, with remainder to her right heirs: and it was declared that the rent-charges of 500*l.* and 700*l.* were limited to Charles Fitzroy and Lord Masham, upon trust to pay and apply the same, by quarterly payments, to such persons and for such purposes as Miss Scudamore should, by

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any writing or writings to be signed with her hand, from time to time, notwithstanding her coverture, appoint; and, in default of such appointment, to pay the said annuities of 500*l.* and 700*l.*, as the same should be received, into Miss Scudamore's proper hands, for her sole and separate use, exclusive of Mr. Howard, who was not to intermeddle therewith, nor were the same to be subject to his debts or engagements; and the receipts of Mrs. Howard, or of the person or persons whom she should, from time to time, appoint to receive all or part of the said annuities, as the same should become due and payable, or as she should become entitled thereto, were, from time to time, to be good discharges for the sums therein expressed to be received. And the trusts of the term of four hundred years were declared to be for securing the three annuities of 1000*l.* 500*l.* and 700*l.*, and the trusts of the term of five hundred years, for raising portions for daughters of the marriage: and, after reciting certain indentures of the 10th and 11th June, 1767, by virtue whereof the castle of Sheffield and other hereditaments in the county of York, stood limited, after the death of Edward, then Duke of Norfolk, and failure of issue male of his body, to Mr. Howard, for life, without impeachment of waste, with remainder to trustees to preserve, &c., with remainder to his first and other sons in tail male, with divers remainders over, Mr. Howard covenanted that he would, within twelve months after the marriage, make a demise or grant, to trustees, of a sufficient part of the last-mentioned estates, not being of less annual value than 800*l.* per annum, and of his reversionary interest therein, for ninety-nine years, if he should so long live, upon trust, when Edward Duke of Norfolk should die without issue male, that the trustees should, during the joint lives of him, Mr. Howard, and Miss Scudamore, raise the annual sum of 300*l.*, and should, from time to time, pay and apply the same, by quarterly payments, unto such person and persons, and for such intents and purposes, as Miss Scudamore should, by any note in writing, from time to time, direct or appoint, notwithstanding her coverture, and, when no such direction or appointment should be made, should pay the said annual sum, or so much thereof whereof no such direction or appointment should be made, into the proper hands of Miss Scudamore, for her separate use and in augmentation of the pin-money thereinbefore appointed to be paid to her out of her own estates; and that, in such grant or demise, Mr. Howard would enter into proper covenants for the due payment of the annuity of 300*l.* from the death of Edward Duke of Norfolk without issue male, to the trustees, for the purposes aforesaid.

In March, 1771, the marriage took effect. In September, 1777, Edward Duke of Norfolk died without issue, and Mr. Howard succeeded to his title, and to his estates in Yorkshire. In 1782, Mr. Scudamore died. On the 16th of December, 1815, Charles Duke of Norfolk died, having, by his will, dated the 15th of November in the same year, appointed the defendant, Henry Howard, his executor.

On the 22d of April, 1816, a commission of lunacy issued against Frances Fitzroy, Duchess of Norfolk, under which she was found to have been a lunatic, not enjoying lucid intervals, from December, 1782; and, on the 13th of August, 1817, the custody of her person and estate was granted to the plaintiff and two other gentlemen, by whom all further proceedings in the lunatic's affairs were to be carried on and conducted. By an order made, in the lunacy, on the 10th August, 1819, it was ordered that the committee should be at liberty to institute a suit in the Court of

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Chancery, against the defendant, as executor of the late duke, for recovery of the arrears of the annuities of 700*l.* and 300*l.*, from December, 1782, till the death of the late duke: and, in May, 1820, a suit was instituted accordingly; but, on the 23d October, 1820, and before any answer was put in to the bill, the duchess died intestate; and letters of administration of her personal estate were granted to the plaintiff. By the duchess's death, the interest of the committees determined; and the bill was dismissed.

The estates settled by the deeds of March, 1771, and comprised in the deeds of June, 1767, were of great value, and the rents and profits thereof were received and enjoyed, by the late duke, from December, 1782, till his death; and, during that interval, the income of the late duke was amply sufficient to enable him to maintain a separate establishment for the duchess, suitable to her rank and situation, without applying any part of the annuities of 700*l.* and 300*l.* for that purpose.

The bill in this cause, which was filed on the 7th April, 1823, after stating as above, charged that the late duke, from December, 1782, till his death, appropriated all the rents of the said estates to his own use, and that no part of the annuities was, during that period, applied according to the trusts thereof declared by the deed of the 23d of March, 1771, or raised; and that the late duchess did not, after December, 1782, consent, and that, in fact, she was, from that time, incapable of consenting, by reason of her lunacy, that her husband should receive and apply to his own use the whole rents and profits of the said estates, without deducting the amount of the said annuities by way of pin-money. The bill prayed that it might be declared that the arrears of the annuities of 700*l.* and 300*l.*, from December, 1782, till the late duchess's death, were due to her estate; and that the same might be paid, to the plaintiff as her administrator, out of the late duke's personal estate.

The defendant in his answer denied the truth of the finding of the jury, that the late duchess did not enjoy lucid intervals; and submitted that he was not bound by such finding. He said that he believed that, from and after December, 1782, the whole of the annuities of 700*l.* and 300*l.* was, under the circumstances mentioned in his answer, applied to the duchess's use. He denied that the late duke did, from December, 1782, till his death, or during any part of that time, appropriate, the whole rents and profits of the estates to his own use, without deducting the annuities; but, on the contrary, he believed that the duke, during the whole of that time, applied, not only the annuities, but also additional yearly sums to a very large amount, to the duchess's use, in maintaining for her a separate establishment suitable to her rank, and in providing her with carriages and horses, and with clothes, ornaments, and all such articles of necessity, convenience, comfort and enjoyment as are contemplated to be provided by settlements of pin-money: and that, in case the duchess enjoyed lucid intervals, and was, during such intervals, capable of consenting to and approving of, or appointing such application of the annuities, he believed, and submitted it ought to be presumed that, during such intervals, she consented to and approved of, or appointed such application of the annuities, to her use, by the duke; and that, for long after December, 1782, and, as he believed, for a considerable part of the time between that period and the duke's death, the trustees of the pin-money resided in the vicinity of the duchess, and were in the habit of visiting her and the duke, and had, thereby, frequent opportunities of knowing the nature

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of the establishment which was maintained for the duchess, and of ascertaining the application of the annuities; and, under such circumstances, he submitted that it ought to be presumed that the duke applied the annuities to the duchess's use as aforesaid, with the knowledge and approbation of the said trustees; and, under the circumstances aforesaid, he believed that the whole of the annuities was applied, during the period in the bill mentioned, according to the trusts thereof declared by the deed of the 23d of March, 1771; but, at what time, or how and by whom the same was so applied, save as aforesaid, he could not set forth.

The answer was replied to; but no witnesses were examined on either side. Before the cause was heard, the following admissions were agreed to: 1st, That the duchess should be considered to have been a lunatic from December, 1782, without lucid intervals, but without prejudice to the defendant thereafter going into evidence to prove lucid intervals, if the court should be of opinion that the rights of the parties would be affected thereby: 2d, The plaintiff alleging that the money expended upon the duchess's establishment, was much less than the amount of her separate income, and the defendant alleging that it considerably exceeded it, it was agreed, for the purposes of the discussion, that the fact as to such deficiency or excess, should not be assumed either way, but that a reference should be made to the Master, to inquire into the fact, if in the opinion of the court the rights of the parties would be affected by the proof of such fact either way; it being admitted that no direct payment was made to her separate use, according to the strict provisions of the settlement.

Sir E. Sugden, Mr. Pepys, Mr. Stuart and Mr. Wingfield for the plaintiff:

The ground on which courts of equity have, in certain cases, refused to decree an account of the wife's pin-money, is a presumed agreement, founded on the acquiescence of the wife, that her separate income should be thrown into the common fund for the maintenance of the family: but, in no case has an account of the last year's income been refused; because, until her income becomes due, it cannot be presumed that she will not claim it. The wife's pin-money does not become the property of the husband because she does not claim it; but there must be an acquiescence, every year, to the retainer by the husband, before it can become part of his personal assets. There is a singularity in the frame of the settlement. First of all a rent-charge was limited, out of the duchess's estate, to Mr. Scudamore for his life, and then another rent-charge of 500*l.*, which was to be afterwards increased to 700*l.* a year, was limited to trustees, for the joint lives of the duke and duchess, for the duchess's separate use, and terms of years were created for securing those rent-charges: and then the same estates were settled on the duchess, for her life, with remainder to the duke, for his life. So that it manifestly was the intention of the duchess's friends, who knew that there would be a large surplus income arising from the estates after paying the rent-charges, to leave the whole property in the duchess during her life, and not to give to the duke any interest except in his marital right. This, therefore, is a very strong case; for the defendant's counsel must contend that, notwithstanding this very marked intention to keep the duchess's separate property divided from the estate which she had retained for herself, the duke was entitled to take the whole income of her estates.

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Under the commission, the duchess was found to have been a lunatic, without lucid intervals, from December, 1782. We admit that the defendant is not absolutely bound by the verdict of the jury; but it is *prima facie* evidence; and, until it is rebutted, the duchess must be considered to have been, from that time, wholly incapable of consenting to any arrangement respecting her property. Now, if there must be either previous contract, or acquiescence, which amounts to evidence of a previous contract, to entitle the husband to the wife's separate income, the previous contract, in this case, was the other way, and the duchess never was in a state of mind to assent. Then can the defendant say that the duke was entitled to the duchess's separate income, because he applied more than that separate income to her use? By the very terms of the marriage contract, the duke was bound to maintain the duchess, according to her station in society, without encroaching on her pin-money. If the duchess had been sane, it is quite clear that the duke must have maintained her according to her rank. Her insanity, in all probability, rendered her maintenance less expensive than it would have been had she been sane; could then her insanity afford any ground for the duke to claim her pin-money? Another ground on which the claim is put in the answer is, that the trustees resided in the neighbourhood of the duchess, and frequently visited her, and saw the style in which she was maintained by the duke, and that, therefore, it must be presumed that they approved of the duke's application of the pin-money. It must, however, be first shown that the duchess approved of the application of her pin-money; for the trustees had no authority to interfere as to its application, except under her direction; and she was incapable of giving any direction respecting it. If the commission had issued at an earlier period, the effect of it would have been, not to relieve the husband from supporting his wife, but to protect her property. The commission, however, did not issue till after the duke's death; and the defendant can have no right to say that the pin-money ought to have been taken for the maintenance of the duchess, when, under the marriage contract, the duke took the surplus rents of her estates, subject to the obligation of maintaining her during his life. The Attorney-General *v.* Parnther, 3 Bro. C. C. 441; 4 Bro. C. C. 409; Brodie *v.* Barry, 2 Ves. & Beam. 36. In Powell *v.* Hankey, 2 P. W. 82, the *whole* of the wife's estate was settled to her separate use; and yet the court refused to direct the account. That case is very different from the present; for, in this case, it was clearly the object, of the parties to the settlement, that the husband should take the wife's estate through the limitation to the wife.

Sir Charles Wetherell, Mr. Knight and Mr. Stephenson, for the defendant:

The provision made for the late Duchess of Norfolk, by the settlement on her marriage with the late duke, was pin-money, and it is so called in the settlement. It is impossible to assimilate, for all purposes, a provision of that nature, to a settlement of a large landed estate, or a large sum of stock to which a lady is entitled, to her separate use. A very different rule may be applicable to the two cases. Pin-money is merely a provision for the fanciful and luxurious enjoyment of the wife: neither a child, nor any person except the wife, is intended to benefit by it, and it does not continue longer than the joint lives of the husband and wife. In The Attorney-General *v.* Parnther, the provision was not pin-money, or in the

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nature of pin-money, but had been derived from the lady's father, independently of any consideration of marriage. The proceeding by which the husband had got possession of the fund, was not only a fraud in itself, but a fraud on this court. It is singular that the point was not argued, and that the attention of the court was never drawn to the question, how far the husband was liable to account. If the attention of the court had been drawn to that question, it is most extraordinary that such a decision should have been come to, without any regard to the former decisions; for, in no former instance had the account been carried back as against the husband. The grounds upon which the court proceeded, in that case, were, perhaps, that the husband had been guilty of a fraud, and that the property was not pin-money, but separate estate. Brodie *v.* Barry was a case in which an uncle, knowing that one of his nieces (who was a married woman) was a lunatic, made a provision for her separate use; and Lord Eldon, in his judgment, admits that there might be circumstances under which the husband would be entitled to have the separate estate applied for the maintenance of his wife; and his lordship directed certain inquiries to be made, the result of which is not disclosed; but it may be that his lordship ultimately directed the wife's separate income to be paid to her husband. It is observable that Lord Eldon alludes to the circumstance of the husband having maintained his wife, as an ingredient in the case. In Fowler *v.* Fowler, 3 P. W. 355, which is a strong authority on the subject, it was laid down, by Lord Talbot, C., "That, where pin-money is secured to the wife, and it appears that the husband, notwithstanding, provides the wife with clothes and other necessaries, this, during such time as the wife is so provided for by the husband, will be a bar to any demand for her arrears of pin-money." Now that position is not founded, either wholly or partially, upon the ground of acquiescence, but simply upon the ground that the wife was provided, by the husband, with all that was necessary for her. There is no case in which the account of pin-money has been carried back more than a year, where the husband had maintained his wife. The only cases in which the account has been carried further back as against the husband, are cases of separate estate. The object of pin-money is to secure, to the wife, those additional luxuries and comforts which the husband would not be bound to allow her. It is not suggested that the late duchess of Norfolk was not, in every respect, maintained according to her rank and station in society, or that she had not all the comforts and luxuries which it was possible for her to enjoy. If those facts are at all questioned, an inquiry should be directed as to them.

We do not admit that the duchess did not enjoy lucid intervals; and, if her consent is considered as in any respect necessary, that fact also must be inquired into. The Attorney-General *v.* Parnther and Brodie *v.* Barry, which have been cited for the plaintiff, are authorities to show that the husband is entitled to have inquiries directed as to how his wife was maintained, and what extraordinary expense was occasioned in consequence of her lunacy.

In this case, whatever was paid to the duchess, was to come, directly, out of the duke's pocket, and not from another quarter, as was the case in The Attorney-General *v.* Parnther and Brodie *v.* Barry. If the duke had taken out a commission against the duchess in his lifetime, and had not placed her in confinement, but had maintained for her, as he did, an expensive establishment, suitable to her rank, can it be contended that he

would not have been allowed that pin-money which he was, himself, to pay? Can it be argued that the Lord Chancellor would have directed that the pin-money should be accumulated for the next of kin, when all the expense which the duke could have been compelled to incur in providing, for the duchess, every comfort that her situation required or would admit of, would not have exceeded a few hundreds a year? The duke having supplied the duchess with all those luxuries and comforts which her pin-money was intended to procure, it would be against good faith to make him pay that money over again; for it was upon the faith that he was not to be called upon for the pin-money, that he maintained her as he did.

If, as we contend, the consent of the wife is not necessary to limit the account as against the husband, there is an end of this case; but, if such consent is necessary, then inquiries ought to be directed to ascertain the particulars before-mentioned, and especially whether those luxuries and comforts, to which her pin-money was applicable, were provided for her.

The Vice-Chancellor:—I do not require any reply.

This is a case of great importance, both on account of the sum, and, also, on account, if I may use the expression, of its novelty. I confess, however, that I have a very clear opinion upon the subject.

When the case was first opened to me, I felt that the doctrine of this court is that the wife is as much entitled to her separate estate, as any individual is entitled to an estate in which he has an exclusive property; but that, in cases in which it may be presumed that the wife has consented that the husband shall receive, for his benefit, what otherwise would be hers, or has acquiesced in his using it, there the court will not give any account at all, or will not extend it beyond one year. Now, for this purpose, we must look a little at what is to be found in the cases. One of the earliest is Powell *v.* Hankey. In that case, there was a settlement made, to the separate use of the wife; and, after the marriage, the wife constantly permitted the husband to receive the interest of the securities, not making any complaint: and Lord Macclesfield said: "that, with regard to any of the interest on the mortgages and securities received by the husband during the coverture, as it was against common right that the wife should have a separate property from the husband (they being both, in law, but as one person), so all reasonable intendments and presumptions were to be admitted against the wife in this case; and, forasmuch as she had, for ten years together, permitted the husband to receive this interest, without making the least objection, either to the husband, or to the debtors who paid the money, or to her own trustees, it should be, therefore, intended that she consented to the husband's receipt of this interest." Then, in the following page, his lordship says: "As to the case of separate maintenance, the court took notice that the husband's maintaining the wife, barred the wife's claim in respect thereof. So, if there should be a provision for the wife's separate use for clothes, if the husband finds those clothes, the wife's claim will be thereby barred: that, in case of the wife's separate maintenance, if this be not demanded by her, she will be concluded, even where she has no other person to demand it of but her husband, which probably she might be afraid to do. But that the principal case was not so strong, in regard there the wife might have demanded it from her own trustees; neither was it material whether the allowance or maintenance-money was provided out of that estate, which was, origi-

nally, the husband's, or (as in the principal case) out of what was the wife's own estate; for that, in both cases, the wife's not having demanded it for several years together, shall be construed a consent from her that the husband should receive it; and, as to this point of the arrears of separate maintenance not being demanded by the wife in his lifetime, the case of Judge Dormer and the Bishop of Salisbury was cited." Now it is perfectly plain that Lord Macclesfield does, in reasoning upon the case, put the non-interference of the court after the lapse of years during which the husband and wife had lived together, upon this, that it is reasonably to be presumed that the wife consented, and that the wife permitted it. Now that is language that can only be applicable to the case of a person openly consenting and permitting it, and, therefore, it appears to me not to be applicable to a person in the unfortunate situation of this lady.

As to the case of Fowler *v.* Fowler, it is to be observed, in the first place, that what is said by Lord Chancellor Talbot, seems a little inconsistent with the principal point decided; because, if he had been prepared to say that the arrears of pin-money never constituted a debt, there could be no reason to declare that the gift of a legacy destroyed that debt. That is the point decided; and, having decided that the gift of a legacy constituted the destruction of the debt created by the arrears of pin-money incurred previously to the making of the will, he then says: "Where pin-money is secured to the wife, and it appears that the husband, notwithstanding, provides the wife with clothes and other necessaries, this, during such time as the wife is so provided for by the husband, will be a bar to any demand for her arrears of pin-money." Now the language of his lordship is rather inconsistent, because necessaries, generally speaking, are not the object of pin-money; but pin-money, as Mr. Stephenson has very properly expressed it, is applicable to fanciful expenditure.

Then in the case of Smith *v.* Lord Camelford, 2 Ves. jun. 716, Lord Loughborough, after arguing a great deal upon the effect of the power of appointment, says: "though the property was settled to her separate use, yet, if she permitted him to spend the income, he is not accountable." There the Lord Chancellor puts the non-accountability of the husband upon the fact that the wife had permitted her husband to spend what was hers.

Whistler *v.* Newman, 4 Ves. 129, was a case where, there being a settlement made to the separate use of the wife, the trustee disposed of the trust fund, and lent it to the husband, or applied it for his use. The wife filed a bill after the death of the husband; and it appears, by the report, that no account was given of any arrears or dividends during the husband's life. Lord Eldon, in Parkes *v.* White, 11 Ves. 209. 225, speaking of the case of Whistler *v.* Newman, says: "The account was not given far back:" which is remarkable, for the account was not given at all: "and it was justly restrained; for the wife might permit the husband to receive the property from time to time, and, in that case, the court will only give the account for one year." And, in the case of Dalbiac *v.* Dalbiac, 16 Ves. 126, which came before Sir W. Grant, that learned judge says: "The account of the by-gone dividends cannot go further back than the death of the husband. As they lived together, she would be entitled to no account against his representative, and therefore, not against his creditor and assignee." It is obvious that his Honour alluded to the very point that was made the subject of conflict in the

former cases, namely, that implied permission and consent on the part of the wife, may be inferred from the act that she and the husband lived together, and she never made any demand.

Then, if that is the law of the court, and the reason why the court will not interfere, we are to consider what is to be done with the case in which a presumption that there was a consent, is totally displaced. Now it is admitted that the pin-money never could be intended to be applied to the necessary maintenance of the dutchess; and, if the duke had not maintained the duchess, and she had incurred debts for her maintenance as a duchess, the tradesmen might have maintained actions against the duke, though they might have supplied her with articles to an amount far beyond her separate income. Then it appears that the duke did, from December, 1782, defray all the necessary expenditure for the maintenance of the dutchess, not absolutely according to her rank, but according to her rank having regard to her unfortunate situation: which, to some extent, incapacitated her from living according to her rank. She had, however, all the conveniences and comforts that her unfortunate situation required; and I apprehend that the duke was, by law, liable to the obligation of maintaining the dutchess, notwithstanding the income which was provided for her separate use. I do not, therefore, think that it is, in the least, necessary to direct any inquiry as to whether the sum expended for the maintenance of the duchess, did or did not exceed her pin-money: and, as the finding of the inquisition was general, and as there is no specific representation, in the answer, of any particular case of lucid intervals, it appears to me that this is not a case in which I am at liberty to direct an inquiry upon that subject. This then is a case of a trust for providing a separate income for the duchess; and in which it is not shown that she could have consented, or permitted by any acquiescence of her own mind, the duke to receive her separate income. My opinion is that the trust is unaffected by any rule that the court has laid down; and the consequence is that the duchess's personal representative is entitled to all the arrears of the pin-money, from December, 1782, down to the duke's death.

Woodward *v.* Haddon.

4 *Simons*, 606.

A mortgagor having taken the benefit of the insolvent act, the provisional assignee was made a defendant to a suit to foreclose. He put in an answer claiming no interest in the premises: Held, that the plaintiff ought to pay him his costs, and add them to his debt.

November 9, 24, 1831.

THIS was a suit by a second mortgagee, to redeem the first mortgage, and to foreclose the equity of redemption. The mortgagor having been discharged under the insolvent debtors' act, the provisional assignee of the insolvent debtors' court was made a defendant. He put in an answer claiming no interest in the mortgaged estate, except such, if any,

as was vested in him as provisional assignee, and submitting whether the estate was vested in him, and whether he was a necessary party to the suit. At the hearing of the cause, Mr. Teed appeared for the provisional assignee, and asked for his costs.

The Vice-Chancellor said that he would mention the point to the Lord Chancellor and the Master of the Rolls.

November 24.—On this day his Honour said that he had conferred with the Lord Chancellor and Master of the Rolls, and that their opinion, as well as his own, was that, as the provisional assignee had made no claim by his answer, the plaintiff ought to pay him his costs in the first instance, and add the amount to the debt due to him on the mortgage.

Lett *v.* Morris.

4 *Simons*, 607.

A. having contracted to pay to B. 2360*l.* by instalments, B. signed and gave to C. for valuable consideration, a paper authorizing A. to pay parts of each instalment to C., and 460*l.* to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day on which it was signed: Held, that the writing was an equitable assignment of the sums mentioned in it, to C.

November 11, 1831.

ON the 4th of June, 1828, the defendant Greenaway, a builder, entered into a written agreement with the defendant Morris, who was the proprietor of a tavern in Bishopsgate-street, to pull down and rebuild the tavern, for 2360*l.*, payable by instalments, according to the progress made in the work. In July, 1828, Greenaway applied to the plaintiff, a timber merchant, to supply him with deals and timber to the amount of 700*l.* to enable him to complete his contract; which the plaintiff consented to do on having security for the amount. Accordingly Greenaway, on the 14th of July, 1828, signed and gave to the plaintiff, a paper-writing in the following words:

"Mr. Wm. Morris:—Sir,—Mr. Thos. Lett, timber merchant, Commercial-road, Lambeth, having engaged to supply me with timber, deals, &c., necessary for the performance of my contract entered into with you for the completion of certain buildings in Bishopsgate-street, I hereby *authorize* you to pay, to Mr. Thomas Lett the undermentioned sums of money, at the respective dates, being part of the moneys payable to me at those periods, according to my contract; and Mr. T. Lett's *receipt shall be your discharge.* "James Greenaway.

"Witness, C. Stanley.

£.80 out of the first instalment.
80 out of the second do.
80 out of the third do.
460 *to be reserved in Mr. Morris's hands out of the balance of the contract.*
£.700

14th July, 1828."

On the same day, Lett served Morris with a duplicate of this order, signed by Greenaway: and, in July and August, 1828, Lett supplied Greenaway with deals and timber to the amount of 679*l.*

On the 27th of September, 1828, Mr. Bray, who was Morris's surveyor and architect, informed the plaintiff, by letter, that the first advance of money to Greenaway, would be made on the 29th of that month, at Mr. Morris's house, and that, if he thought proper to send a person, all transactions would be public and open for inspection. The plaintiff attended accordingly, and Morris paid 80*l.*, part of the first instalment, to Greenaway, and he handed it over to the plaintiff. The second instalment having become due, Morris, on the 4th of December, 1828 (Greenaway not being then present), paid 80*l.* out of it, to the plaintiff's clerk. The third instalment afterwards became due, and the building was subsequently completed, but Morris refused to make any further payment to the plaintiff: upon which the bill was filed, charging that the order of July, 1828, was an equitable assignment, to the plaintiff, for valuable consideration, of 700*l.* out of the moneys payable, by Morris, to Greenaway, by virtue of the contract, and praying for an account of the moneys which had become due, from Morris to Greenaway, in respect of the contract, and that Morris might be decreed to pay, to the plaintiff, the sums remaining due to him by virtue of the order of the 14th July, 1828.

Morris, by his answer, said that he never assented to or acquiesced in the order of July, 1828, or agreed to obey or be bound by it, but always treated it and the notice as things with which he had nothing to do: that Bray's letter, to the plaintiff, was written without his authority: that he paid the two sums of 80*l.* to Greenaway, who afterwards paid them to the plaintiff or his clerk, as he, the defendant, had been informed and believed. It appeared, however, by the evidence, that those two sums were paid as before stated.

Sir E. Sugden and Mr. Campbell, for the plaintiff:

The order of July, 1828, operated as an equitable assignment of a debt. To give validity to an assignment of a debt in this court, the consent of the party who owes the debt, is not necessary, as it is at law. Row *v.* Dawson, 1 Ves. 331; *Ex parte* South, 3 Swanst. 392. Besides, the evidence shows that the order was recognized by Morris, and that he twice acted upon it after he had been served with the notice. On the 4th of December, 1828, no one was present but Morris and the plaintiff's clerk, and Morris then paid the 80*l.* to the clerk.

Sir C. Wetherell and Mr. G. Richards for the defendant Morris:

The order is not imperative: it amounts only to an authority, to Morris, to pay the sums to the plaintiff. It was not such an assignment as the party claiming under the builder could set up adversely to the person for whom the house was to be built. It gave nothing more than a discretion to pay the money, and was, at the most, an indemnity in case of payment. It is one thing to give a discretion, and another to give an interest. The two cases cited do not contain words of discretion, but of direction. An instrument cannot be an assignment, if there is any discretion to reject it. In *Ex parte* South, the executor retained the draft, and said that he would pay it as soon as the state of the testator's assets enabled him to pay simple-contract debts, and that, in the mean time, he would hold it as a charge; and those circumstances are particularly no

ticed by Lord Eldon, in his judgment. *Ex parte* Heywood, 2 Rose, 355; Scott *v.* Porcher, 3 Mer. 652.

Next: the authority was revoked. Morris, whose object was to prevent any liability accruing to himself, from Lett, paid the money to Greenaway, and he received it and handed it over to Lett. Consequently the money was distributed in a different manner from what was contemplated under the authority.

The Vice-Chancellor:—I entertain no doubt that the order of July, 1828, amounts to an equitable assignment. The following passages in that order are very important: "And Mr. T. Lett's receipt shall be your discharge;" and "460*l.* to be reserved, in Morris's hands, out of the balance of the contract;" and the word "authorize" does not countervail the effect of those passages.

Declare that the order of July, 1828, operated as an equitable assignment to Mr. Lett, of the sums therein mentioned.

The order of July, 1828, was not stamped. In the course of the argument, the defendant's counsel required it to be produced, which was resisted by the plaintiff's counsel, on the ground that the defendant Morris had admitted, in his answer, that the order was in the words and figures, or to the purport or effect mentioned in the bill, and did not crave leave to refer to it when produced.

The Vice-Chancellor ruled that the plaintiff was not compellable to produce the order.*

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4 *Simons*, 611.

Testator bequeathed 12,000*l.* stock, to trustees, for his son for life, then for the son's wife for life, then, unto and amongst his wife and children, in such shares, for such interests, &c. as the son should appoint, and, in default of appointment, unto the children, equally, and if there should be no child, then to the son's next of kin in blood: and the testator bequeathed his residue to his son and his, the testator's, two other children, their executors, &c. equally: and he directed that the share of his son should be held, by his trustees, for the benefit of him and his children, upon the same trusts, and subject to the same limitations, &c., as the 12,000*l.* stock, but that the son's wife should not take any interest in that share. The son died, leaving his wife surviving, but never having had a child: Held, that an appointment made by the son of part of the stock, to his wife, was good; but that the son, in the events that had happened, was not entitled to the share of the residue absolutely, but that his next of kin in blood were entitled to it.

November 15, 16, 1831.

ROBERT HOUSTOUN, Esq., made his will, dated the 12th October, 1826, as follows: "I give and bequeath, unto my nephew, Colonel Robert Houstoun, John Plummer and Ralph Dunn, the sum of 12,000*l.* three

* See Huddleston *v.* Briscoe, 11 Ves. 583; Owen *v.* Jones, 2 Anstr. 505.

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per cent consolidated bank annuities, to be transferred to them, or purchased in their names, immediately after my decease: and I do hereby direct the said Colonel Robert Houstoun, John Plummer and Ralph Dunn to stand possessed of the said sum of 12,000*l.* three per cent consolidated bank annuities, upon trust to pay, apply and dispose of the interests, dividends and annual proceeds in any manner as they my said trustees shall, in their discretion, think fit, for or towards the maintenance, support, use and benefit of my son Robert Rae Houstoun, or otherwise, in their discretion, to pay such interest, dividends and annual proceeds, to my said son Robert Rae Houstoun, or permit and empower him to receive the same, for and during the term of his natural life, so that my said son shall not sell, assign or dispose of, or in any manner anticipate the same; and, from and after the decease of my said son Robert Rae Houstoun, in case he should leave Mrs. Houstoun, his present wife, him surviving, then upon trust to pay the interest, dividends and annual proceeds of the said 12,000*l.* three per cent consolidated bank annuities, unto his said wife or her assigns, or well and effectually to empower her or them to receive and take the same, for and during the term of her natural life, for her own use and benefit; and also, from and after such decease of my said son Robert Rae Houstoun, but subject, nevertheless, to the life interest of the said wife of the said Robert Rae Houstoun of and in the said interest and dividends of the said 12,000*l.* three per cent consolidated bank annuities, in case she should survive my said son, upon trust to transfer, assign and pay the said 12,000*l.* three per cent consolidated bank annuities, and the stocks, funds and securities in or upon which the same shall be invested, *unto, between and amongst the said wife of my said son Robert Rae Houstoun, if she shall be then living, and any child or children he may have,* in such shares and proportions, for such rights and interests, to be paid and transferred at such ages, days and times, and with such benefit of survivorship, and subject to such contingencies and restrictions as my said son, Robert Rae Houstoun, at any time or times hereafter, by his last will and testament in writing, or any codicil or codicils thereto, to be by him duly published in the presence of and attested by two or more credible witnesses, shall direct, limit or appoint, and in default of such direction, limitation or appointment, and in case of any such, and the same shall be in any manner defective and incomplete, then upon trust to transfer, assign and pay the whole of the said 12,000*l.* three per cent consolidated bank annuities, and the stocks, funds and securities in which the same may be invested, or so much and such part and parts thereof whereof no such direction or appointment shall be made as aforesaid, or whereunto the same shall not extend, subject to such life-interest of my said son's wife as aforesaid, unto, between and amongst the children of my said son Robert Rae Houstoun, if more than one such child, equally, share and share alike, the part or share and parts or shares of such of them as shall be a son or sons to be assigned, transferred or paid to him or them respectively, as and when he or they shall attain his age or their respective ages of twenty-one years, and the parts or shares of such of them as shall be a daughter or daughters to be transferred, assigned and paid to her or them respectively, as and when she or they shall attain the age or respective ages of twenty-one years, or upon her or their marriage or respective marriages, which shall first happen, in case my said son R. R. Houstoun shall be then dead, and, otherwise, upon or in due time after

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his decease. And, if there shall be no child or children of my said son Robert Rae Houstoun, or, if any such there shall be, and all and every of them shall die before they or any of them shall become entitled to the said three per cent consolidated bank annuities, or the stocks, funds or securities in or upon which the same shall be invested, as a vested interest, by virtue of this my will, then I do hereby will and direct that the said three per cent consolidated bank annuities, and the stocks, funds and securities in or upon which the same shall be invested, or so much and such parts thereof as shall not have become vested, or been appointed or disposed of, under or by virtue of the trusts aforesaid, shall go and be paid and transferred to the next of kin in blood of my said son Robert R. Houstoun, according to the statute of distribution of intestate's effects, and I do hereby give and bequeath the same accordingly."

And after disposing of part of his real estate and giving several legacies, free of stamp-duty, which he directed to be paid out of his personal estate, the testator proceeds to dispose of the residue of his estate as follows:

"I give, devise and bequeath all the rest, residue and remainder of my estate and effects, both real and personal, in Great Britain, the West Indies, or wheresoever the same may be, unto my said sons, Robert Rae Houstoun, and Alexander Houston, and my said daughter Elizabeth Houstoun, equally to be divided between them, their heirs, executors, administrators and assigns, share and share alike, as tenants in common. And I do hereby direct that the right, share and interest, of my said son Robert Rae Houstoun, of and in such residue, shall be transferred to, and held by the said trustees, Robert Houstoun, John Plummer, and Ralph Dunn, *for the benefit of my said son and his children*, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as are hereinbefore expressed and declared of and concerning the said sum of 12,000*l.* three per cent consolidated bank annuities, so bequeathed to them as aforesaid, and the interest and dividends thereof; *but it is not my intention to give, to the wife of my said son Robert Rae Houstoun, any interest whatever in the said share of the residue of my estate or the dividends or proceeds thereof:* and I do hereby nominate and appoint the said Colonel Robert Houstoun and Ralph Dunn, executors of this my will."

The testator died on the 27th of January, 1828, leaving the said Robert Rae Houstoun, and the defendants Alexander Houstoun and Elizabeth Houstoun, his only children, him surviving.

The executors purchased the sum of 12,000*l.* three per cent consolidated bank annuities, which was transferred into their names upon the trusts of the will, and they paid the dividends thereof to Robert Rae Houstoun down to the time of his death.

Robert Rae Houstoun made his will on the 18th of January, 1829, and, after reciting the power of appointment given to him by the will of his father over the 12,000*l.* three per cent consolidated bank annuities, proceeded thus:

"Now in pursuance and exercise, and in execution of the said power so vested in me as aforesaid, and of all other powers and authorities to me given, in me vested, or, in anywise, enabling me in that behalf, I do, by this my last will and testament, by me duly published, and attested by the two credible persons whose names are hereunto subscribed as witnesses attesting the same, direct, limit and appoint that the sum of 11,800*l.*

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three per cent consolidated bank annuities, part of the said 12,000*l.* like annuities, shall, immediately after my decease, or as soon after as convenient, be transferred into the name of my said wife, for her own absolute use and benefit, and that the trustees or trustee for the time being under the will of my said late father, shall stand possessed of and interested in the sum of 200*l.* like annuities, the residue of the said sum of 12,000*l.* like annuities, subject nevertheless to the life-interest therein of my said wife, in trust for all and every the child and children which I may leave, in equal shares, if more than one, and, if there shall be but one such child, then for such only child, to be paid or transferred to them, him or her at their respective ages of twenty-one years: and, whether I have children or not, it is my will that my said wife shall have the said sum of 11,800*l.* three per cent consolidated bank annuities."

And after giving various legacies, he bequeathed all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder or expectancy, unto his said wife, to and for her own absolute use and benefit; and he appointed John Charles Hunter and Charles Bellingham, his executors.

Robert Rae Houstoun died in August, 1829, without ever having had any child, leaving the plaintiff, Margaret Eliza Houstoun, his widow, and the defendants Alexander Houstoun and Elizabeth Houstoun, his brother and sister, and only next of kin, him surviving.

In January, 1830, the widow and executors of Robert Rae Houstoun filed their bill against the executors and trustees of the will of Robert Houstoun, and also against the brother and sister of Robert Rae Houstoun, submitting that the 11,800*l.* stock was duly appointed by Robert Rae Houstoun's will, to the plaintiff Mrs. Houstoun, and that the plaintiffs, Hunter and Bellingham, as the personal representatives of Robert Rae Houstoun, were, under the will of Robert Houstoun, in the events which had happened, entitled to one-third of the residue of his, Robert Houstoun's, personal estate, and praying that the rights and interests of the plaintiffs might be ascertained: that Robert Houstoun's executors might transfer the 11,800*l.* stock, to the plaintiff Margaret Eliza Houstoun, and pay to her the dividends of the rest of the 12,000*l.* stock during her life: that the usual accounts might be taken of the said Robert Houstoun's personal estate, and that the plaintiffs, Hunter and Bellingham, as the personal representatives of Robert Rae Houstoun, might be declared to be entitled to one-third of the residue of Robert Houstoun's personal estate.

The defendants, Alexander and Elizabeth Houstoun, by their answer, insisted that Robert Rae Houstoun, never having had any child, the power of appointment over the 12,000*l.* stock, given to him by his late father's will, never arose, and that Robert Rae Houstoun having died, without ever having had a child, the whole of the 12,000*l.* stock, subject to Mrs. Houstoun's life-interest therein, had become the absolute property of the defendants, Alexander and Elizabeth Houstoun, as the only next of kin in blood of Robert Rae Houstoun, according to the statutes of distribution: and that, in consequence of R. R. Houstoun having so died, one-third of the residue of Robert Houstoun's personal estate had become, under the trusts of his will, the property of the same defendants, as the only next of kin by blood of R. R. Houstoun.

The cause was heard, at the Rolls, on the 25th of June, 1830, when it was referred to the Master to make inquiries as to the next of kin of

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Robert Rae Houstoun living at his death, and to make various other inquiries; and to take an account of the personal estate of Robert Houstoun. The Master having made his report, the cause now came on to be heard for further directions.

Sir E. Sugden and Mr. Palk, for the plaintiffs:

There are two questions in this cause, 1st, Whether, in the event which has happened of Robert R. Houstoun dying without a child, but leaving his wife surviving, the power of appointment given to him, by his father's will, over the 12,000*l.* stock, was capable of being exercised by him in favour of his wife.

2d. Whether the one-third of the residue of Robert Houstoun's estate, which he bequeathed in trust for Robert Rae Houstoun, has passed to R. R. Houstoun's executors, or to his next of kin.

1st. If Robert Houstoun, instead of giving, to his son, a power to appoint the stock amongst his wife and children, had made a direct bequest of it to them, the wife, in the event which has happened of there being no child living at the decease of R. R. Houstoun, would have taken the whole fund. Can it make any difference, whether the testator makes an immediate bequest, or intends the bequest to take effect by means of the execution of a power. Mogg *v.* Mogg, 1 Mer. 654.

The wife and children of R. R. Houstoun formed the class of persons in whose favour the power was to be exercised.

The testator intended that his son's wife should, at all events, have a life-interest, and, it being doubtful whether his son would have children or not, that it should be in his son's power, to give his wife a larger interest.

The cases of Doe *v.* Denny, 2 Wils. 337; and Roe *v.* Dunt, Ibid. 336; which will be cited for the defendants, are distinguishable from the present case: for, in those cases, there was one child only, and, in default of appointment, the property was limited to the children in fee, and the donee of the power gave a limited interest to the only child. The power given to R. R. Houstoun, was not confined to the mere distribution of the shares which the objects of the power were to take, but it enabled him to define the rights and interests which those objects were to take, the ages and times at which the shares were to be paid to them, and the contingences and restrictions to which the shares were to be subjected. The decision in Boyle *v.* The Bishop of Peterborough, 1 Ves. Jun. 299; S. C. 3 Bro. C. C. 243, governs this case. Lord Eldon agreed with that decision, in all respects. Butcher *v.* Butcher, 1 V. & B. 79. Here the wife was one of the class of persons to whom the fund was to be appointed, and the failure of one of the class does not prevent the execution of the power. This case is stronger than Boyle *v.* The Bishop of Peterborough; for the wife is not an object of the gift in default of appointment; so that, if she was to take at all, she must take under an execution of the power. The testator intended that, if her husband so willed it, she should take in competition with the children; then can it be contended that, if there were no children, the testator intended that she should not be capable of taking any share of the fund? On the contrary, the clear intention was that, if there should be no children, she should be the sole object of the power.

2d. Robert Rae Houstoun, in the events which have happened, took an absolute interest in one-third of his father's residuary estate. By the

will, an absolute gift of one-third of the residue was made to each of the testator's children, with certain modifications and limitations as to the share of R. R. Houstoun. The testator's intention was, not to affect the absolute interest given to R. R. Houstoun, more than was necessary to give effect to those modifications and limitations; and, as the case in which they were to take effect has never arisen, the absolute interest was never defeated. Smither *v.* Willock, 9 Ves. 233. The court cannot extend the words of a will, on conjecture. Grassick *v.* Drummond 1 Sim. & Stu. 517.

Mr. Pepys, Mr. Ching, and Mr. C. H. Maclean, for the defendants, the executors of Robert Houstoun, and the brother and sister of Robert Rae Houstoun:

1st. In default of R. R. Houstoun exercising the power given to him by his father's will, over the 12,000*l.* stock, his wife was to take no share: his children only were to take. If there should be no child, the testator directs that the stock shall go to the next of kin in blood of R. R. Houstoun; so that there is an express provision as to what is to take place in the event which has happened.

[The Vice-Chancellor:—That direction was to take effect in default of appointment only.]

In Boyle *v.* The Bishop of Peterborough, there were two objects of the power; and, in default of appointment, they were to take the property equally. In this case, the power never existed at all. The father contemplated his son having children, and, in that event, he gave him power to appoint the stock amongst his wife and children: but, if he had no child, the father did not intend his son to have the disposal of the fund. The author of the gift did not intend that the wife should be an object of his bounty, beyond the life interest which he had provided for her, but that, if his son had a child, the son should have the power of giving, to his wife, a share of the fund. This case, then, is the reverse of Boyle *v.* The Bishop of Peterborough; and it falls within Doe *v.* Denny and Roe *v.* Dunt. In those cases the children were the objects of the power; and, if there was no appointment, they were to take the fee-simple of the estate. The principle of the decisions of those two cases, was that, as the power was gone for the purpose of distribution, it was gone for the purpose of limiting the interest which the only child was to take.

[The Vice-Chancellor:—In Doe *v.* Denny and Roe *v.* Dunt, the estates, in default of appointment, were limited to the children in fee: therefore, the children took the fee by virtue of that limitation, and the appointees over could take nothing. In this case, if the wife had died in her husbands lifetime, leaving one child only, that child, in default of appointment, would have taken a vested interest, provided it survived the father and did not die before twenty-one; would it not then have been competent to the father to appoint, absolutely, to the child, during its minority?]

The father might have increased the child's interest, but could not limit it. In Boyle *v.* The Bishop of Peterborough, Lord Thurlow says: "That brings it to the question whether the power has not lost its opportunity of being exercised by the death of the son; or whether there is a capacity of appointing, where only one child if left; and, if at all, whether it must not be with reference to the clause which provides for

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its going in case of no appointment. The words breed the doubt. Where there are only two children, the power, by way of exercise of discretion, is totally gone by the death of one before it is exercised, and it cannot be the same power, in point of extent, as when meant to be a distribution among several; for which it is necessary that there should be several. But this clause made it proper for her to express that she did intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect to that clause, she had a power to appoint to one only: for though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it. I think the extent of her power is such as to enable her to express her intention: that she has done, and, therefore, it must go according to the intent." Lord Thurlow's judgment turned on the particular frame of the instrument in the case before him, which, in default of appointment, gave vested interest to the children on their attaining twenty-one, though they died in the lifetime of the donee of the power. Here there is no such clause.

2d. The share of the residue given to Robert Rae Houstoun, was to be held, by the trustees, for the benefit of him and his children, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as had been before expressed concerning the 12,000*l.* bank annuities: but the testator declares that it was not his intention to give, to his son's wife, any interest whatever in that share of the residue of his estate. Under the trusts, powers and limitations expressed concerning the 12,000*l.* stock, other objects besides the son and his children, were intended to be benefitted, and the testator here excludes one only of those objects. The fair conclusion is that he intended the other objects (who were his son's next of kin in blood), to take; for, if he had intended to exclude them as well as the wife, he would have said so. The gift in question must be construed in the same manner as if he had repeated the very terms of the former bequest, except so far as they related to the son's wife.

The Vice-Chancellor:—It is perfectly true that I cannot add to the testator's will, neither can I reject the words which I find in it.

With respect to the second question, (which I shall dispose of first,) I have to observe that the testator has, in the first instance, given, one-third of the residue of his estate to his son, Robert Rae Houstoun, and then he says: "I direct that the right, share, and interest of my said son, Robert Rae Houstoun, of and in such residue, shall be transferred to, and held by the said trustees, Robert Houstoun, John Plummer and Ralph Dunn, for the benefit of my said son and his children, upon the same trusts, and subject to the same powers, conditions, limitations and restrictions, in every respect, as are hereinbefore expressed and declared of and concerning the said sum of 12,000*l.* three per cent consolidated bank annuities so bequeathed to them as aforesaid, and the interest and dividends thereof; but it is not my intention to give, to the wife of my said son Robert Rae Houstoun, any interest whatever in the said share of the residue of my estate, or the dividends or proceeds thereof." Now the persons who were made to participate, more or less, with respect to direct and remote interest, in the 12,000*l.*, were Robert Rae Houstoun, Robert Rae Houstoun's children, his wife, and his next of kin in blood,

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in a particular event. And the testator here has directed that the absolute interest, in the one-third of his residuary estate, given to his son R. R. Houstoun shall, nevertheless, be held by the trustees, for the benefit of Robert Rae Houstoun, and his children, (who are two of the four objects,) upon the same trusts, and subject to the same limitations and restrictions as the 12,000*l.* bank annuities. One of the limitations and restrictions is that, in case of there being no appointment in favour of the children, and there being no children who should attain the age of twenty-one, then that the 12,000*l.* bank annuities should go over to those persons who should be Robert Rae Houstoun's next of kin in blood. It appears to me, therefore, without straining the words, but only giving to them their natural meaning, that I am bound to say that, under the terms "limitations and restrictions," the next of kin in blood of Robert Rae Houstoun, would take the same interest in the share of the residue, as they would have taken in the 12,000*l.* consols. Mr. Pepys' observation upon that part of the case, is extremely pertinent and strong: for, there being four descriptions of persons named to participate in the 12,000*l.*, and the testator having named the wife as a person who should not participate in it, and not the next of kin, the inference is extremely strong that the testator intended that all those persons, except the wife, should participate in the one-third of the residue: and my opinion, therefore, upon that question, is in favour of the next of kin.

With respect to the first point, I am of opinion that the principle of the case of Boyle *v.* The Bishop of Peterborough, is directly applicable. Because the testator has given the fund to the son for life, then to the wife for life, and then, after the decease of the son, subject to the life-interest of the wife, upon trust that the trustees should transfer the fund, unto, between and amongst the wife of his son, if she should be then living, and any child or children that he might have, in such manner as he should appoint. And then he proceeds to declare what will take place in default of such appointment; and my opinion is that all the passages of the will which follow, are governed by the words: "in default of such direction, &c."

The facts of this case are that the wife survived her husband, but there was no child. In the case of Boyle *v.* The Bishop of Peterborough, Mrs. Walsingham had two children, a son and a daughter: and she first appointed a portion of the fund to her son, who afterwards died; and then she appointed the residue of the fund to her daughter: and then it was said that the daughter could not take by virtue of the execution of the power. Now Lord Thurlow admits that the power, as a power of distribution, had ceased; and then he says: "But this clause," that is the clause disposing of the fund in default of appointment, "made it proper for her to express that she did intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause, she had a power to appoint to one only: for, though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it." I think that that case, which was approved of and followed by Lord Eldon, is not distinguishable, in substance, from the present case. Because here the wife was as much intended to take through the exercise of the power, as the children were: and it would be strangely inconsistent to say that there must be children in order to enable the wife to take; but that, if there had been children and no wife, the power

might have been exercised with respect to the children. I think that the right of executing the power must be considered as a right as much in favour of one as of the other.

What I have now said, is not, in the least, inconsistent with the decisions in Wilson's Reports. In each of those cases there was a child who was an object of the power; and, consequently, the power to appoint in default of children never arose. That was all that the court had to decide; and that was the point, which, as I understand those cases, the court did decide, although I admit that the Chief Justice seemed to consider that there might have been an appointment in tail to the child. It was however quite enough for the court to say that there was no question at all, with respect to the power in default of children, as the fact was, in each case, that there was a child in existence, which prevented therefore any exercise whatever of the power of appointment over.

My opinion, therefore, is, that this is a case which is concluded, as to the first question, by what was decided by Lord Thurlow, in the case of Boyle *v.* The Bishop of Peterborough, and which was approved of and followed by Lord Eldon; and, accordingly, I declare that Mrs. Houstoun, the wife of R. R. Houstoun, is entitled to the 11,800*l.* consols.

Crompton *v.* Wombwell.

4 *Simons*, 628.

If a plaintiff, when his cause is in such a state that he cannot amend his bill, discovers new matter which may tend to show that he is entitled to the relief prayed by his bill, he may file a supplemental bill, for the purpose of putting the new matter in issue.

November 4, 1831.

IN May, 1805, the defendants, Lord Melbourne and Sir George Wombwell, as trustees of the estates of the late Earl of Fauconberg, contracted to sell to the plaintiff a part of those estates, situate in the parishes of Leak and Over Silton in Yorkshire, tithe-free. In 1807, the Vicar of Leak filed a bill, in the exchequer, against the tenants of those parts of the estates which were situate in the parish of Leak, claiming the tithes of hay and all the small tithes of the lands in their occupation.

By indentures of lease and release of the 9th and 10th of June, 1808, the estates agreed to be sold were, in pursuance of the contract, conveyed, by the trustees and other necessary parties, to the plaintiff in fee: and by a memorandum indorsed on the release, it was declared that, although 14,000*l.* was, in the release and the receipt indorsed thereon, mentioned to be the consideration-money paid, to the trustees, yet 10,400*l.* only was, in fact, paid to them, the sum of 3600*l.* having been laid out, by the plaintiff, with the consent of the trustees, in the purchase of 5255*l.* 9*s.* three per cent reduced annuities, in the names of the trustees, and of the plaintiff and Samuel Crompton the younger, pending the suit in the exchequer: and that it had been agreed that, until that suit should be decided, the dividends of the 5255*l.* 9*s.* reduced annuities should be

[Crompton *v.* Wombwell.—4 Sim. 628.]

received by the trustees, and by the plaintiff, and Samuel Crompton the younger, and be laid out, in their names, to accumulate, and that the accumulated fund should be disposed of according to the trusts to be declared thereof by a deed then intended to be prepared. Accordingly, by a deed-poll dated the 21st of October, 1808, it was declared that Lord Melbourne, Sir G. Wombwell, the plaintiff, and Samuel Crompton the younger should, until the suit in the exchequer should be determined, accumulate the dividends of the 5255*l.* 9*s.* reduced annuities, and in case the suit should be determined against the vicar, then that they should transfer the accumulated fund to Lord Melbourne and Sir George Wombwell; but, in case, on the decision of the suit, all or any of the estates purchased by the plaintiff, should be decreed to be subject to tithes, then upon trust that Lord Melbourne, Sir George Wombwell, and Samuel Crompton, the younger, should, out of such accumulated fund, raise and pay, to the plaintiff, so much money as would be a sufficient compensation to him for his costs of suit, and for the tithes which should be decreed to belong to the vicar, and should tranfer the residue of the fund to Lord Melbourne and Sir G. Wombwell.

In February, 1825, the tithe suit in the exchequer, was heard, and the bill was dismissed with costs.

The original bill in this cause, which was filed against Lord Melbourne, Sir George Wombwell, George Wombwell, Thomas Edward Wynn Bellasyse, Samuel Crompton the younger, A. R. Cocker and R. Speechley, alleged that the accumulated fund then amounted to 10,267*l.* 15*s.* 6*d.* three per cent reduced annuities: that, pending the suit in the exchequer, certain old documents were found, in the evidence-room of the late Lord Fauconberg, which tended to prove that the lands which the plaintiff had purchased in the parish of Over Silton, were subject to the payment of tithes to the master, fellows and scholars of Trinity College, Cambridge, who were the rectors of that parish. The bill further alleged that the Fauconberg family had been, for a great many years, lessees of the tithes of Over Silton, under the college: and that the last of such leases expired at Michaelmas, 1819, when Lord Melbourne and Sir George Wombwell declined to renew: that, until after the execution of the deed-poll, the plaintiff had no notice of the beforementioned documents, or that the college, or any person except the Vicar of Leak, claimed, or had any ground for claiming, tithes arising on the lands which he had purchased. The bill prayed that the plaintiff might be paid a compensation, out of the accumulated fund, for the tithes of the lands which he had purchased in Over Silton.

The answers to this bill having been put in and replied to, in Hilary Term, 1830, the cause was set down for hearing: and publication was enlarged, by consent, till Michaelmas Term, 1831. On the 20th of July, 1831, the plaintiff filed a supplemental bill, against the same persons as were defendants to the original bill, (except Lord Melbourne, who was dead,) setting forth some of the allegations and the prayer of the original bill, and the proceedings which had taken place in the suit, and, stating, *by way of supplement*, that, in the aforesaid stage of the said cause, and, in June, 1831, the plaintiff, for the first time, discovered that the master, fellows and scholars of Trinity College, and the several persons thereinafter named, had executed the deeds after-mentioned, and that Sir George Wombwell had taken the after-mentioned leases and underleases; and that, previously to June, 1831, the plaintiff had no knowledge or notice

[Crompton *v.* Wombwell.—4 Sim. 628.]

that Sir George Wombwell had or claimed any interest in the tithes of Over Silton; that, by an indenture of the 20th October, 1817, Trinity College demised to J. Horner and Joseph Smith, the tithes of Over Silton, for the term of twenty years from Michaelmas then last, subject to a lease theretofore granted thereof to Lord Fauconberg, two years of which were then unexpired: that, by an indenture of the 26th of October, 1820, the lease was assigned, by Smith and by Horner's executors, to Sir George Wombwell: that, since the execution of the indenture of October, 1820, Sir George Wombwell had obtained a renewal of the lease, and that the deed of renewal, and also the deed of October, 1820, were in the custody of Sir George Wombwell, or of some other person, and that he ought to set forth the date, parties' names, and material contents of the former deed, and in whose custody it was: that, since the original bill was filed, the 10,267*l.* reduced annuities had been transferred into, and were then standing in the name of the Accountant-General in trust in the original cause, and that Sir George Wombwell, George Wombwell, T. E. W. Bellasyse, A. R. Cocker and R. Speechley claimed to be entitled to that sum: that Lord Melbourne was dead, and Sir George Wombwell had become the surviving trustee under Lord Fauconberg's will: that it was most important, to the plaintiff, to show and give in evidence, at the hearing of the cause, against the defendants to the original bill, that the beforementioned leases and underleases had been granted; and that, for that purpose, and under the circumstances therein appearing, the plaintiff was entitled to file that his supplemental bill. The prayer was, that that bill might be declared and taken to be a supplemental bill to the original bill, and that the plaintiff might have the benefit thereof, and of the original suit and proceedings, and that the plaintiff might have the relief prayed by his original bill, and such further or other relief as, &c.

Sir G. Wombwell demurred to the supplemental bill.

Mr. Pepys and Mr. Koe, in support of the demurrer:

No new matter is put in issue, nor is the case made by the original bill, at all, aided or varied by what is stated in the supplemental bill. If the right to the tithes of Over Silton is in Trinity College, it is wholly immaterial that Sir George Wombwell is the lessee of those tithes. There can be no further or other relief, than that which is prayed by the original bill; and, if an answer were put in admitting all that is stated by way of supplement, the discovery would be entirely useless.

Sir George Wombwell is made a party to the original bill, merely as a trustee: but the supplemental bill is filed against him as having become a lessee of the college, and, therefore, as having a beneficial interest in the tithes of Over Silton. If this supplemental bill is sustainable, it would be competent, to the plaintiff, to file a similar bill against Trinity College, and all their other lessees, to ascertain whether they are or are not entitled to the tithes in question. But it is quite clear that a bill, against an owner of tithes, to ascertain whether an estate is or is not subject to those tithes, cannot be sustained.

Sir E. Sugden and Mr. Barber in support of the supplemental bill:

The facts which the plaintiff states that he has discovered since the original cause was at isssue, might have been introduced, by amendment, into the original bill, if the state of the proceedings in the cause had not precluded the plaintiff from amending the bill: the plaintiff, therefore,

has been compelled to do, by supplemental bill, that which, in an earlier stage of the cause, he might have done by amendment. If the bill had been amended, Sir George Wombwell could not have refused to answer the amendments; neither can he withhold the discovery when it is sought by supplemental bill. The supplemental bill, though it is, in form, a bill for relief, is, in effect, a bill of discovery; and it is clear that a supplemental bill may be filed in a case of this nature. Mitf. Plead. 48, 49. 263. This bill has nothing to do with the question of the *right* to tithes; its object is only to establish the fact of the *claim* of tithes.

The Vice-Chancellor:—It has been admitted that, when a cause is in such a state that the bill cannot be amended, a supplemental bill may be filed, for the purpose of putting new matter in issue. Mr. Pepys thinks that that cannot be done, except where the new matter will vary the relief prayed by the original bill. But that is not the only case in which such a proceeding may be taken; for the new matter to be introduced may be either such as will vary the relief prayed, or such as will tend to prove the plaintiff's right to that relief. If this plaintiff, after the cause had been set down for hearing, had discovered matter which would have concluded the case against this defendant, he would have had a right to put that matter in issue by filing a supplemental bill.

Besides, it may have a material effect towards making Sir George Wombwell pay the costs of the suit, if it turns out that, at the time when he represented that the estate was not subject to tithes, he was aware that that representation was false.*

Demurrer overruled.

Simpson *v.* Walker.

5 *Simons*, 1.

A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will.

November 16, 22, 1831.

IN 1792 the plaintiff and Lot Simpson his brother became, under their late father's will, seised in fee, as tenants in common, in equal moieties, of a messuage, and about twenty-three acres of land in the parish of Crick in the county of Derby, in remainder expectant upon the decease of Rumey Simpson their mother. In 1811 Lot Simpson went to Buenos Ayres, and obtained a subsistence there by manual labour. In October, 1817, Rumey Simpson died; and, upon her death, Lot Simpson returned to England. In 1818, he entered into a treaty with the plaintiff, for the purchase of the plaintiff's moiety of the estate; but they were not able to agree as to the price, and, accordingly, they referred it to the defendant (who was the son of their late father's executor, and resided near the

* See Colclough *v.* Evans, 4 Sim. 76. In that case the supplemental bill sought to change the issue raised by the original bill, and to make a new and different case.

estate) to fix the price. The price was accordingly fixed by the defendant, and paid, by Lot Simpson, to the plaintiff; and he, thereupon, conveyed his moiety of the estate to Lot Simpson in fee. In November, 1818, Lot Simpson returned to Beunos Ayres, having previously appointed the defendant to manage and receive the rents of the estate, in his absence. In August, 1825, Lot Simpson again returned to England, but he never resided upon, or in the neighbourhood of his estate; and the defendant continued to manage and receive the rents of it. In June, 1830, Lot Simpson died, leaving the plaintiff his heir-at-law, who was then resident in North America. The plaintiff, on his return to England, in January, 1831, required the defendant to deliver up to him the possession of the estate, and to account to him for the rents received since Lot Simpson's death; which the defendant refused to do, alleging that he had purchased the estate of Lot Simpson, and that it had been conveyed to him by certain deeds and assurances dated in May, 1830, in consideration of an annuity of 50*l.* to be paid, by the defendant, to Lot Simpson during his life.

The bill, after stating as above, charged that the plaintiff had discovered, and that the fact was that Lot Simpson did execute such deeds and assurances; but that the defendant prevailed upon him to execute them, by misrepresentation and undue influence, as after mentioned, and that such deeds and assurances were, therefore, void *in equity*: that Lot Simpson was an ignorant and unlettered person, and had been, all his life, except for a few months before his death (when he became too ill to work), a common labourer, and had never been instructed in or practised any trade of business: that, in early life, he had became addicted to excessive drinking, and was, up to the time of his death, an habitual drunkard: that he was a person of very weak intellect, and easily led and practised upon by any person with whom he happened to be associated: that the defendant, though he was by trade a cordwainer, had been, for many years, much accustomed to business of a general nature; and had been, on many occasions, employed, by his neighbours and friends, to make their wills, and other instruments of a legal nature: that the defendant, before and at the time of the execution of the deeds of May, 1830, had acquired great influence over Lot Simpson, who was accustomed to consult him about his affairs, and to be guided by his advice: that, at the time of the execution of the deeds, the estate was free from incumbrances, and the clear rental thereof was 47*l.* 10*s.* per annum, and Lot Simpson was not at all indebted to the defendant; and that he had no knowledge of the rental of the estate, or of the value thereof, except as he was informed thereof, by the defendant; and that, before and when he executed the deeds, he was informed, by the defendant, and believed that the yearly value of the estate was much less than 47*l.* 10*s.*, and that it was subject to many outgoings and deductions, and that the annuity of 50*l.* for his life, was a full and adequate consideration for the same: that no valuation of the estate was made for Lot Simpson, by any person, nor was any person employed, on his behalf, in relation to the sale; and that, at the execution of the deeds, he was not in a fit state of mind to do any deliberate act of business. The bill prayed that the deeds and assurances of May, 1830, might be declared to be invalid *in equity*, and be delivered up to be cancelled: that *the defendant might execute a conveyance of the estate to the plaintiff*, and account with him for the rents received since Lot Simpson's death, and that a receiver might be appointed.

[Simpson *v.* Walker.—5 Sim. 1.]

The defendant pleaded that Lot Simpson, by his will, dated the 20th April, 1829, and duly executed and attested for devising freehold estates of inheritance, devised the estate in question, and all other his real estate to the defendant, for his life, and after his decease, to Samuel Walker and Hannah Walker, the defendant's son and daughter, equally, as tenants in common, and to their heirs and assigns: provided that, if either of them should die under twenty-one and without issue, then the testator devised the said estate to the survivor of them, his or her heirs and assigns; and, if both of them should die under twenty-one and without issue, then to the defendant's right heirs: that the testator died in June, 1830, without having altered or revoked his will, except so far as the same might be deemed to have been altered or revoked by the deeds in the bill mentioned to have been executed in May, 1830, and leaving the defendant and his two children him surviving.

Mr. Knight and Mr. Rolfe in support of the plea:

The plaintiff's position is that the deeds of May, 1830, are not only void, but operate as a revocation of the will. In Hawes *v.* Wyatt, 2 Cox, 263, Lord Alvanley decided that a deed which was void on equitable grounds only, was a revocation of a will: but Lord Thurlow reversed that decree, 3 Bro. C. C. 156: and consequently, this plea cannot be disallowed without overruling Lord Thurlow's decision. Supposing the deeds to be invalid in equity, then, according to the doctrine laid down by Lord Thurlow, in Hawes *v.* Wyatt, the transaction is to be treated as a mortgage merely; and, in this court, a mortgage, being only a security for money, is not a revocation of a prior will. Upon what principle is it that a deed, which is inoperative in equity, is held to carry with it an intention to revoke a will? The ground on which the court interferes when it sets aside a deed for fraud, is that there was no intention at all to execute the deed. If a party makes his will, and afterwards does an act varying the disposition of his property, if that act cannot take effect, why should it be inferred that he had an intention to alter the disposition of his property which he had made by his will. Lord Alvanley's decision in Hawes *v.* Wyatt benefited a third party, and not the plaintiff. Here the testator made his will for the benefit of the defendant, and then conveyed the estate to him; why is he to be placed in a worse situation than he would have been in if no such conveyance had been executed. Parker *v.* Ramsbottom, 3 Barn. & Cress. 257, is very analogous to the present case.

Secondly: the bill states a case, not merely of equitable, but also of legal invalidity; for it alleges that Lot Simpson, when he executed the deeds, was not in a fit state of mind to do any deliberate act of business. Now a deed which is void at law, is not a revocation of a prior will, but is a mere nullity.

Mr. Wigram, in support of the bill:

Lord Alvanley held in three different cases,* that a deed which was void in equity, was a revocation of a prior will: and Lord Hardwicke was of the same opinion. Hick *v.* Mors, Amb. 215. That case was not cited on the appeal, to Lord Thurlow, from Lord Alvanley's decision, in

* Hawes *v.* Wyatt, *ubi supra.* Harmood *v.* Oglander, 6 Ves. 215. *Ex parte* The Earl of Ilchester, 7 Ves. 373.

[Simpson *v.* Walker.—5 Sim. 1.]

Hawes *v.* Wyatt. In The Attorney-General *v.* Vigor, 8 Ves. 283, Lord Eldon expressed considerable doubt as to the soundness of the principle of Lord Thurlow's decision. The ground upon which a Court of Equity rescinds a conveyance which at law is valid, is not that the grantor did not intend to convey, but that the party to whom the conveyance is made is not entitled in equity to the benefit of that intention. The legal estate has passed, in fact, and that alone is decisive.

The objection that the bill states a case of legal invalidity, if it appears on the face of the bill, ought to have been taken advantage of by demurrer, and not by plea: and the fact that the plaintiff is obliged to call for a re-conveyance, disposes of all the arguments in support of the plea.

The Vice-Chancellor took time to consider the case; and on this day delivered judgment to the following effect:

In this case, the plaintiff, who is the heir of Lot Simpson, has filed a bill, insisting that certain deeds, dated in May, 1830, were executed under circumstances of fraud, which make them void in equity. The fraud is represented to consist in the defendant having induced Lot Simpson, a weak man, to execute the deeds for a very inadequate consideration, under a belief that the consideration was adequate; and the bill charges that the intention of Lot Simpson was to sell for full consideration, and not to make a gift: and the bill prays that the deeds may be delivered up to be cancelled, and the estate conveyed, by the defendant, to the plaintiff. The defendant has pleaded that, prior to the date of the deeds, Lot Simpson duly made his will, and devised the estate to the defendant, and that the will was not revoked otherwise than by deeds mentioned in the bill.

In Hawes *v.* Wyatt, Lord Alvanley held that, in such a case, the will was wholly revoked. Lord Thurlow reversed Lord Alvanley's decree. But, in Lord Ilchester's case, Lord Alvanley expresses an adherence to his own opinion; and Lord Eldon, in The Attorney-General *v.* Vigor, disapproves, or, at least, doubts of the propriety of Lord Thurlow's decision. When the case of Hawes *v.* Wyatt was before the court, no notice seems to have been taken of Hick *v.* Mors, in which Lord Harwicke decided in the contrary way from Lord Thurlow.

The balance of opinion seems to be in favour of the position that the will was revoked. But in the absence of authority, my opinion, upon principle, is against the plea.

If a feoffment be made, without livery of seisin, it revokes a prior will. So a bargain and sale not inrolled, is a revocation. Now, in the present case, the legal estate is admitted to have passed by the deeds; and it seems clear that if, after the deeds had been executed, a full consideration had been paid to Lot Simpson, he could never have impeached them: for he did intend to convey to the defendant. The deeds, therefore, though imperfect in equity immediately upon their execution, might, afterwards, have been made complete; and they were perfect at law. They, consequently, operated as a total revocation of the will; and the plea must be overruled; but, on account of the conflict of authorities, without costs.

Sayle *v.* Graham.

5 *Simons*, 8.

Plaintiff amended his bill; before the amendments were answered, the suit abated. Plaintiff then filed a bill of revivor and supplement, praying that the defendants might answer that bill, together with the amendments. The defendants put in an answer to the bill of revivor and supplement only. Motion to take the answer off the file, for irregularity, refused.

November 14, 1831.

THE plaintiffs had amended their bill; and before the defendants had answered the amendments, the suit became abated by the marriages of two of the female plaintiffs; upon which the plaintiffs filed a bill of revivor and supplement, praying that the defendants might answer that bill, together with the amended bill; and an order to revive was afterwards obtained. The defendants, before they had answered the amendments, put in an answer to the bill of revivor and supplement only.

Mr. Knight, for the plaintiffs, now moved that that answer might be taken off the file, for irregularity. He said that it was contrary to the practice of the court for the defendants to answer the bill of revivor and supplement, and leave the amended bill unanswered.

Mr. Jacob for the defendants.

The Vice-Chancellor:—The usual course, certainly, is, in cases like the present, to put in one answer to the bill of revivor and supplement and the amendments; but there is no settled rule making it necessary so to do. Where a plaintiff has taken exceptions to an answer, and intends to amend his bill, he obtains an order for leave to amend, and that the defendant shall answer the amendments and exceptions at the same time. That seems to imply that an order is necessary to make the defendant answer the amendments, together with the exceptions. I cannot say that it is clear that, in this case, the amendments ought to have been answered; and therefore I cannot grant the application. De Tastet *v.* Lopez, 1 Sim. 11.

Davis *v.* Hammond.

5 *Simons*, 9.

AN affidavit in support of a motion for a serjeant at arms, under 11 Geo. 4. and 1 Will. 4. c. 36, rule 1, which relates to the defendant's residence, and not to the place where he was at the issuing of the attachment, is insufficient.

November 17, 1831.

Collard *v.* Hare.

5 *Simons*, 10.

The bill had been dismissed at the hearing, with costs, which the plaintiff refusing to pay, he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody, upon bail, but retook him before the writ was returnable. The court refused to order the sheriff to pay the costs.
November 21, 22, 1831.

AT the hearing of this cause, the bill had been dismissed with costs. The costs were, afterwards, taxed; and the plaintiff was personally served with a subpœna for payment of them; and the amount was, at the same time, demanded of him; which he having refused to pay, the plaintiff caused an attachment to be issued against him, and he was taken into custody under it. Afterwards the sheriff's officer who had the plaintiff in custody, suffered him to go at large on bail, without the consent of the defendant, and without his having paid the costs. The sheriff, however, before the attachment was returnable, retook the plaintiff, and he had ever since remained in custody.

A motion, of which notice had been given before the return of the attachment, was now made on the behalf of the defendant, that the sheriff might be ordered to answer his contempt in having suffered the plaintiff to go out of his custody upon bail, after having taken him under the attachment; and that the sheriff might be ordered to pay the amount of the costs, to the defendant, within a week after service of the order to be made on the motion, and also the costs of and incidental to the writ of attachment, and of the application.

Mr. Knight, in support of the motion:

The attachment, in this case, issued for non-payment of costs, which the plaintiff was directed to pay by the decree made at the hearing, when his bill was dismissed. That decree being the final conclusion of the suit, the attachment was equivalent to a *capias ad satisfaciendum* on final judgment at law; and, as it is a process of execution, no bail can be legally taken upon it. A moment's escape is sufficient to fix the sheriff; and he is not discharged from his liability by retaking the plaintiff, and having him in custody at the return of the writ. Levett *v.* Letteney, Reg. Lib. 1784, fo. 10. Anon.*

Mr. Cooke, for the sheriff:

It does not appear in either of the cases which have been cited, that the application was made, as in the present case, before the return of the attachment, or that the sheriff had the party, against whom the writ had issued, in custody at the return of the writ; and, in the latter of those cases, the sheriff did not appear, and Lord Eldon, when he made the order, observed that it was a strong measure.

Here the attachment did not issue in execution of a decree, but to

* 11 Ves. 170. Beames on Costs, 138, 139, and Appendix, 352, 353.

enforce payment of costs: it was not in the nature of execution, but of mesne process. Anon. Prec. Cha. 331. Danby *v.* Lawson, 1 Eq. Ab. 351. pl. 3, 4. Anon. 2 Atk. 507. It appears by those cases (neither of which was cited in the case before Lord Eldon), that the attachment is not a final process. Morris *v.* Hayward, 2 Marsh. 280; S. C. 6 Taunt. 569, shows that the sheriff is at liberty to take bail upon an attachment out of chancery. In Lewis *v.* Morland, 2 Barn. & Ald. 56; 2 Com. Dig. Bail, F. 8, it was decided that an attachment for non-payment of money, is in the nature of mesne process, and that, where the sheriff has the defendant in custody at the return of the writ, an action for an escape cannot be maintained against him. The notice of motion in this case was served before the return of the writ. No proceeding of a summary nature, can be taken, at law, against the sheriff, until the writ has been returned.

Mr. Knight, in reply:

The case in Eq. Ab. is unintelligible; and in the case cited from Prec. Cha. the liability of the sheriff was not at all discussed: it only shows that a messenger may go for the party. In Lewis *v.* Morland the ground of the judgment was that an attachment, at law, for non-payment of money, was not final process. Bayley, J. says: "The object, therefore, of this writ being to bring the party into court to answer, it is in the nature of mesne process. The nature of final process, or execution, on the other hand, is to satisfy the plaintiff. The attachment issues upon the *ex parte* affidavit of the person who demands the money awarded to be due by the Master's allocatur, stating that the same has not been paid. If that were final process, there would be nothing further to be done, by the court, but to commit: but that is not the practice; for interrogatories are filed to be answered, and the court ultimately pronounce, upon those answers, whether the party is to be committed for contempt or not; for then only, and not before, does commitment take place." 2 Barn. & Ald. 62. In this court, it is not the practice to examine the party on interrogatories, and then to commit him; there is no proceeding between the caption and the commitment: and consequently the grounds on which the judgment in Lewis *v.* Morland was founded, do not exist in the present case.

The Vice-Chancellor:—I have referred to all the cases that were cited in the course of the argument, but I have not found any conclusive authority upon the subject of the motion. From what is stated in the report of the anonymous case before Lord Eldon, it appears that his lordship expressed it to be his opinion that it was a strong measure to order the sheriff to pay the costs, and that he made the order, ultimately, on the ground that the parties had been served with notice, but did not appear. Besides, in that case, and in Levett *v.* Letteney, the application was made after the return of the attachment, and the party seems to have wholly escaped from the sheriff's custody. But here the application is made before the return of the writ; and the sheriff has retaken the party. So that there is a material distinction between those cases and the present case.

Having regard, therefore, to the want of authority binding me to make the order applied for, (though I admit that there is authority that leads to

it,) I am of opinion that the proceeding is of so severe and harsh a nature, that I ought not to make any order on this motion.

Robinson *v.* Field.

5 *Simons*, 14.

In 1800, A. B. & C. entered into partnership as attorneys, upon certain terms expressed in a memorandum. In 1808, A. died, leaving B. his executor and residuary legatee, and then B. & C. formed a partnership, and agreed to share the profits equally. In December, 1825, their partnership was dissolved by consent. During the former partnership A. & B. had made advances, both jointly and severally, for C.'s private use: and during the latter partnership B. made similar advances. In 1827, B. became bankrupt. No settlement of accounts having taken place between any of the parties, in July, 1831, B.'s assignees filed a bill, against B. & C., for an account of the dealings of both partnerships, and of all the advances made by A. & B. C. pleaded the statutes of limitations (21 Jas. 1. & 9 Geo. 4.) to so much of the bill as related to such advances: Held, that as the plea extended to the joint advances of A. & B. during the first partnership, it covered too much, and was, therefore, bad.

November 24; December 7, 1831.

THE plaintiffs were the assignees of Samuel Churchill, the younger, a bankrupt, and the defendants were the bankrupt, and S. C. Field, his late partner. The bill, which was filed on the 1st of July, 1831, stated (amongst other things) that in October, 1800, S. Churchill, the elder, S. Churchill, the younger, and Field entered into partnership together, as solicitors and attorneys, for seven years, upon the terms expressed in a memorandum prepared by S. Churchill, the elder, by which it was stipulated (amongst other things) that S. Churchill, the elder, should receive 100*l.* per annum, out of the profits of the business, and that the remainder should be divided between S. Churchill the younger, and Field: that the partnership continued until April, 1808, when it was determined by the death of Churchill the elder, who, by his will, appointed Churchill the younger his executor and residuary legatee: that, after the death of Churchill the elder, Churchill the younger and Field agreed to carry on the business, in partnership, upon the terms expressed in the memorandum, so far as the same were applicable to the altered state of circumstances, and that, accordingly, it was agreed between them that, from the death of Samuel Churchill, the elder, they should be interested in the profits of the business, in equal moieties; that the business was carried on by them accordingly until the 31st of December, 1825, when the co-partnership between them was dissolved by mutual consent: "That Churchill the elder, during his life, and Churchill the younger, both in the lifetime of Churchill the elder, and afterwards, lent and advanced to Field, and paid for his use, sundry large sums of money, at interest, at five per cent:" that, on the 26th of March, 1827, a commission of bankruptcy was issued against Churchill the younger, under which he was found a bankrupt, and the

plaintiffs were chosen his assignees: that no settlement of the accounts of the co-partnerships, had ever been made, either during the life of Churchill, the elder, or since his decease, "and that no settlement of accounts had ever taken place between Churchill the elder, during his life, and Churchill the younger, or either of them, and Field, in respect of the sums advanced and applied, by Churchill the elder and Churchill the younger, to and for the use of Field, and that a considerable balance was due, to the plaintiffs, as such assignees as aforesaid, in respect thereof," and that, upon a fair settlement of the accounts of the partnership, Field would be found to be greatly indebted to the plaintiffs, as such assignees as aforesaid: "that, on the 5th of April, 1805, Churchill, the elder, advanced 800*l.* to Field, to enable him to purchase a dwelling-house, and that, between the 4th of February, 1808, and the 31st of December, 1809, Churchill, the elder, and Churchill the younger, advanced the sum of 5483*l.* to Field, to enable him to complete the purchase of an estate, and also various other sums of money, at interest at the rate aforesaid; and that, although Field had made some payments in respect of interest on those sums, he had never repaid any part of the principal, either to Churchill, the elder, or to Churchill, the younger, or to the plaintiffs."

The bill prayed for an account of the dealings and transactions of the co-partnerships, from October, 1800, until the 31st of December, 1825, and that such account might be taken upon the footing of the memorandum prepared by Churchill, the elder, and of the agreement concluded, on his decease, between the defendants, and that an account might also be taken of all sums of money advanced and paid by Churchill, the elder, and Churchill the younger, or either of them, to or for the use of Field, and of payments made by Field in respect thereof, or of the interest thereof, and that the interest at five per cent might be computed on such advances, from the dates thereof: and that what, on taking the said accounts, should be found due, to the plaintiffs as such assignees as aforesaid, from the defendant Field, might be answered and paid by him.

To the discovery sought by the allegations in the bill which are included in inverted commas, and to the relief prayed in respect thereof, the defendant Field pleaded the statute of limitations, (21 James 1. c. 16,) in the usual manner. The plea then proceeded as follows:

"And this defendant, for further plea, saith, that, by an act of parliament, made and passed in the 9th year of the reign of King Geo. 4. c. 14, intituled: 'An act for rendering a written memorandum necessary to the validity of certain promises and engagements,' it was enacted that, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, should be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments in the act of the twenty-first year of the reign of King James the 1st, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise should be made or contained by or in some writing to be signed by the party chargeable thereby. And this defendant, for further plea, saith that he, this defendant, hath never, at any time within six years next before the filing of the said bill, or within six years next before suing out process against this defendant to appear to and answer the said bill, signed any writing by or in which any acknowledgment or promise of, or in relation to the matters hereinbefore pleaded unto, or any part thereof, was or is made or con-

tained. And this defendant hath not, nor hath nor have any person or persons, for him, or on his account or behalf, or by his order, at any time within six years next before the filing of the said bill, or next before suing out process as aforesaid, paid, or caused to be paid any principal money or interest on account of, or for, or upon, or in respect of any such sum or sums of money, or alleged sum or sums of money as aforesaid, or any part thereof." The defendant, Field, then answered the residue of the bill.

Sir E. Sugden, Mr. Knight and Mr. Wright, appeared in support of the plea, and Mr. Pepys and Mr. Swanston in support of the bill.

The Vice-Chancellor:—I think the plea must be overruled, because it is made applicable to the joint advances of Samuel Churchill the elder, and Samuel Churchill the younger, and the separate advances of each of them, to the defendant Field; and though it might have been good as to the separate advances made by Samuel Churchill, the elder, and the separate advances of Samuel Churchill, the younger, prior to the death of the former, I think that no account could have been taken, properly, of the partnership dealings of the three, without an account of the advances jointly made by Samuel Churchill the elder, and Samuel Churchill the younger, to the defendant Field; and no account could have been taken of the partnership dealings of Samuel Churchill the younger, and the defendant, Field, without an account of the advances made by Samuel Churchill, the younger, after the death of Samuel Churchill the elder, to the defendant, Field. The plea, therefore, covers too much, and must be overruled.*

Mason *v.* Hamilton.

5 Simons, 19.

A. delivered goods to B. a wharfinger, to be kept for him; and afterwards directed B. to transfer them to C., which was done. D. then gave notice to B. not to deliver the goods to any one but him, and thereupon B. refused to deliver the goods to C., upon which C. brought trover against B., and B. filed a bill of interpleader. Afterwards D. abandoned all claim to the goods and withdrew his notice: Held, that the case was a proper case of interpleader, and that D., who had occasioned the suit, must pay to the plaintiff, and the other defendants, their costs at law and in equity.

December 8, 1831.

IN April, 1831, the defendant Livermore delivered ten casks of paints, which he represented to be his property, to the plaintiff, who was a wharfinger in Lower Thames-street, to be housed and kept, by him, for Livermore. Shortly afterwards, Livermore directed the plaintiff to transfer the goods into the name of the defendant Hamilton, and to hold the same for him, which the plaintiff accordingly did. On the 28th of

* Affirmed by the Lord Chancellor, 21st December, 1832.

[Mason *v.* Hamilton.—5 Sim. 19.]

May, 1831, the defendants Emmerson, Price and Cox, who were the assignees of one Burton a bankrupt, gave the plaintiff notice not to deliver the paints to any one but themselves. The plaintiff having, in consequence of the notice, refused to deliver the goods to Hamilton, he, in June, 1831, brought an action of trover against the plaintiff: whereupon the bill was filed, stating that the plaintiff had no interest in the goods, except his lien for wharfage and warehouse rent, and praying that the defendants might interplead together touching the goods, and that Hamilton might be restrained from proceeding with his action.

Hamilton, in his answer, stated that Livermore had made over the goods to him, in satisfaction of a debt; and insisted that the bill had been unnecessarily filed, and that the plaintiff ought to have delivered up the goods to him, without filing the bill.

The defendants, Emmerson, Price and Cox, by their answer, said that, having found that they had no means of establishing, by evidence, any interest in the goods, they, subsequently to the filing of the bill, informed the plaintiff's solicitor that they claimed no interest in the goods, and withdrew their notice: and they disclaimed all interest in the goods, and submitted that the bill ought not to have been filed, and that no case of interpleader was stated thereby.

On the notice being withdrawn, the plaintiff offered to deliver the goods to Hamilton, on being paid his costs at law and in equity, but Hamilton declined the offer. The plaintiff then gave notice of a motion that the goods might be sold, and that the proceeds, after deducting the expenses of the sale, might be paid into court. Before the motion was made, it was arranged that the cause should be heard with the motion.

Mr. R. Roupell for the plaintiff.

Mr. Pattisson for the defendant, Hamilton.

Mr. Bethell for the defendants Emmerson, Price and Cox.

It was contended, for the defendants, that the case stated by the bill, was not a case of interpleader, and Cooper *v.* De Tastet* was relied upon.

No counsel appeared for the defendant Livermore, who was considered as a merely formal party, and had not been served with process.

The Vice-Chancellor, after stating the facts of the case, said that there was no opposition made to Hamilton's claim, either by Emmerson, Price and Cox, or by Livermore, who had given up all claim to the goods: that the bill stated a plain case of interpleader: that it did not appear on what ground Emmerson, Price and Cox founded their claim; but that, consistently with the facts stated, they might have had a right to the goods prior to Livermore's, and, if they had brought an action of Trover against the plaintiff, they must have recovered: that, but for the notice, the goods would have been parted with; and that, in an interpleading suit, where there is no fund in court, and the cause of the institution of the suit can be traced to one of the defendants, that defendant must pay the costs of the plaintiff and of the innocent defendants, as was ordered in Aldridge *v.* Mesner, 6 Ves. 418; Dowson *v.* Hardcastle, 2 Cox 297, and Edensor *v.* Roberts, Ibid. 281, and see Cowton *v.* Williams, 9 Ves. 108; in which last case the minutes of the decree were wrong, and varied from the order pronounced by the Lord Chancellor, by directing the plaintiff to pay the costs of two of the defendants, in the first instance, and then to have those costs again, together with his own, out of the

* Tamlyn's Rep. 177. But see Pearson *v.* Cardon, 4 Sim. 218.

fund in the cause; whereas the Lord Chancellor had directed one of the defendants to pay the costs of the plaintiff and of all the other defendants: that, accordingly, in this case, the defendants Emmerson, Price and Cox, who had occasioned the suit, must pay to the plaintiff, and to the defendants Hamilton and Livermore, their costs both at law and in equity, and the plaintiff must deliver the goods to Hamilton.

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5 *Simons*, 22.

Testator gave annuities out of any money arising from whatever dividends he might die possessed of in the bank of England, and the residue of the said dividends to his brother, A. to enable him to assist such of the children of his brother F. as he should find deserving of encouragement, and, upon the demise of the annuitants or any of them, the testator gave each an annuitant's proportion of the before mentioned dividends, to his brother A., to be at his disposal, but the principal to remain in the bank: Held, that no trust was created for the children of F. but that A. took, absolutely, the capital of the testator's stock, subject to the annuities.

December 14, 1831.

JOHN BENSON made his will, in his own hand-writing, dated the 30th of May, 1822, and in the following words: "I give and bequeath unto my niece, Maria Foster, for her own sole use and disposal, the dividend arising on my share as a contributor to the joint stock of the corporation of the Amicable Society for a perpetual assurance office: to Sarah Acres, spinster (who has been brought up in my family from her infancy), so long as she remains unmarried, the sum of 200*l.* per annum, for her sole and separate use: to my niece, Mary Parsons, 200*l.* per annum, for her sole and separate use, and, after her decease, to be equally divided amongst her three children, or the survivor or survivors of them, and, to the widow of my brother Francis Benson, of the city of York, shoemaker, 50*l.* per annum, out of any money arising from whatever dividends I may die possessed of in the Bank of England, and the residue and remainder of the said dividends, to my brother, Arthur Benson, (*to enable him to assist such of the children of my deceased brother, Francis Benson, as he, the said Arthur Benson, may find deserving of encouragement,*)* to be paid to the said several persons as the same shall become due; and, upon the demise of the said Sarah Acres, Mary Parsons and her three children, and the widow of my brother Francis Benson, or any of them, I bequeath each such person's proportion of the before-mentioned dividends, to my said brother *Arthur Benson, to be at his disposal, but the principal to remain in the bank:* and I also give and bequeath, to the said Sarah Acres, and my before-mentioned niece, Mary Parsons, to be divided equally between them (exclusive of what I have before bequeathed unto them) all my household furniture in town

* See the report of this cause on the hearing, 2 Sim. 493.

† In the original will, these words were in a parenthesis.

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and country, plate, watches, linen, china, notes, bonds, ready cash, live stock and carriages (if any), and all moneys due and owing to me, except what money may be in the hands of any banker, and 1000*l.* lent by me to the trustees for repairing Peterborough church, which I bequeath to my said brother, Arthur Benson, together with the lease or leases of any dwelling-house, land or houses that I may have, they the said Sarah Acres and Mary Persons defraying, or causing to be defrayed, my just debts and funeral expenses, and paying, to each of my executors, the sum of 100*l.* for their trouble in executing this my last will and testament, also 200*l.* to Mrs. Hannah Benson, of Hull, widow, to enable her to put out her four children to some profession, whereby they may be enabled to gain a livelihood, and likewise 20*l.* to Sarah Collins, spinster, and her sister, Frances Stuart, and to Mr. Daniel Denny, silversmith, to purchase mourning. I likewise give and bequeath, to my said brother, Arthur Benson, all my parliamentary books, fire-arms, fishing-rods and tackle thereunto belonging, together with my walking-sticks and canes, and, to the children of my brother Francis Benson, all my wearing apparel, shoes and body linen, to be equally divided amongst them, and I do appoint my said brother, Arthur Benson, and George Whitten, Esquires, executors of this my last will and testament.

The testator died on the 3d of April, 1827.

It appeared, by the Master's report, that Arthur Benson, and Mrs. Parsons and the five other children of Francis Benson, (all of whom were defendants,) were the testators next of kin at his death, and that they were in humble conditions of life; and that the testator, at the date of his will, was possessed of 23,000*l.* stock, in the three per cents and four per cents, and at his death of 27,500*l.* stock in the three and three and a half per cents.

The causes now came on to be heard for further directions; and the questions were, 1st, whether Arthur Benson was entitled, absolutely, to the testator's stock, subject to the payment of the annuities: 2d, whether the will created a constructive trust for the children of Francis Benson: 3d, whether any part of the capital of the testator's stock passed under the bequest to Sarah Acres and Mary Parsons.

Sir E. Sugden, Mr. Knight and Mr. Wright for the executors of Arthur Benson, the plaintiff in the original cause, who had died pending the suit:

The testator has made an indefinite gift, of the dividends of his stock, to his brother Arthur Benson, and, consequently, the capital of the stock passed by that bequest. Phillips *v.* Chamberlain, 4 Ves. 51; Page *v.* Leapingwell, 18 Ves. 463; Adamson *v.* Armitage, 19 Ves. 416; S. C. Coop. C. C. 283; Stretch *v.* Watkins, 1 Madd. 253. 2d, It appears, by the Master's report, that the children of Francis Benson were all in low situations of life, and the testator shows that he knew them to be so, by bequeathing to them his shoes and other articles of wearing apparel. The testator could not have intended that they should take the large sum of stock which he left behind him. He meant that Arthur should take it absolutely, and that it should be left to his discretion to assist such of the children of Francis, as he should find deserving of encouragement. One of two constructions must be put upon this bequest, either Arthur must take the absolute interest in the stock, with a discretion as to assisting

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such of Francis's children as may be deserving of encouragement; or he must be a trustee of the stock, for the children equally, however unworthy they may be of the testator's bounty. There is no case where property has been given to a near relation with a discretion as to assisting certain objects, in which it has been decided that the party has taken anything but an absolute interest in the property. The testator clearly intended a benefit to his brother Arthur. As each of the annuitants dies, the dividends which were applicable to the payment of the deceased person's annuity, are to be at his disposal. If he is to be converted into a trustee, there is nothing in the will to give him even a life interest in the stock: and, if the testator had had no other property than the stock, Arthur would have taken nothing under the will, and the children would have been enabled to assist Arthur. The words "to enable him, &c." impose no obligation; but leave it entirely to Arthur's discretion to assist such of the children of Francis as he may find deserving of encouragement. There is nothing in the will which points out which of the children the testator intended to benefit, or what shares of his stock he meant them to take. The bequest, therefore, must be held to be an absolute bequest to Arthur, leaving it discretionary in him to give what he might think proper to such of the children of Francis as he might find deserving of encouragement. Wright *v.* Atkins,* Sale *v.* Moore, 1 Sim. 534; Meredith *v.* Heneage, Ibid, p. 542.

The Solicitor-General and Mr. Jeremy, for the defendant, Sarah Acres:

1st. It is impossible to maintain that Arthur Benson is entitled to the stock absolutely. The dividends only are given to him for a particular purpose, and the principal is to remain in the bank; so that he could not touch the principal. Stock may pass under the word "money;" and it appears, from the expressions used by the testator, that, when he was speaking of money, he meant money in the funds. He calls the capital of his stock "principal." Now the word "principal" is not applicable to stock, but to money. He directs annuities to be paid out of any money arising from whatever dividends. So that when he spoke of his stock, he spoke of it as money arising from the stock. Gallini *v.* Noble, 3 Mer. 691; Bescoby *v.* Pack, 1 Sim. & Stu. 500; Kendall *v.* Kendall, 4 Russ. 360.

The bequests to Sarah Acres and Mary Parsons is a residuary bequest. The burden which the testator throws on them, is a burden which the law throws on the general bulk of the estate. He imposes on them the whole *onus* of the administration of his property: so that, *quacunque viâ*, Sarah Acres and Mrs. Parsons will take the capital of the testator's stock. The executors cannot take it, for legacies are given to them, expressly, for their trouble: so that, if the court holds that it does not pass to Mrs. Acres and Mrs. Parsons, it is undisposed of, which is a conclusion that the courts never come to if it can be possibly avoided.

Mr. Pepys and Mr. Barber, for the defendant, Mary Parsons:

* In House of Lords. It appears from the report of this case in 1 Turn. & Russ. 143, that the decisions of the Master of the Rolls and Lord Chancellor, 17 Ves. 255, and 19 Ves. 299, were reversed on the appeal.

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Mrs. Parsons has three different titles: 1st, as one of the testator's next of kin, with which we shall not trouble the court: 2d, as one of the children of Francis Benson: and, 3d, under the residuary clause.

The will creates a trust of the residue of the stock, for the children of Francis Benson, after a sufficient portion of it is set apart to pay the annuities. Adamson *v.* Armitage, 19 Ves. 416. In Brown *v.* Casamajor, 4 Ves. 498, it was held that a trust was created by words which are almost identically the same as those used, by the testator, in this case. The words were: "To enable him to provide for his younger children." The only difference is that "provide" is used instead of "assist:" the word "enable," on which the question turns, occurs in both cases. Here both the subject and the objects of the trust are certain. Birch *v.* Wade, 3 Ves. & Beam. 198; Parsons *v.* Baker, 18 Ves. 476; Sale *v.* Moore and Meredith *v.* Heneage, are dissimilar to the present case. In the former, the testator apologises for not leaving anything to his brother and elder sister; and, in the latter, the property was given to the wife, "unfettered and unlimited."

There are no words in the clause now under consideration, from which it can be implied that the testator intended that Arthur Benson should derive any benefit from the residue of the dividends. He has a discretion as to how the dividends are to be applied to assist the children of Francis Benson, but no discretion as to whether they are to be applied or not. When the testator intended a benefit to Arthur, he knew how to express it. The funds for payment of the annuities, are to be at his disposal, as the annuitants die. It cannot, therefore, be supposed that what was contained in the previous part of the gift, was to be at his disposal.

If the court should hold that the trust which we contend for, fails for uncertainty, then that portion of the stock, which is not required for payment of the annuities, passes to Sarah Acres and Mrs. Parsons, under the residuary clause.

Mr. Treslove and Mr. Purvis, for the children of Francis Bacon, except Mrs. Parsons:

Arthur Benson took the whole of the stock that was bequeathed to him imprest with a trust for the benefit of the children of Francis. If Arthur was not intended to be a trustee of the stock, why did the testator direct that the capital should remain in the bank? Doyley *v.* Attorney-General, 2 Eq. Ab. 194; 4 Vin. Ab. 485; 7 Ves. 58, note, and 16 Ves. 47; Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192; Harding *v.* Glyn,* Birch *v.* Wade, 3 V. & B. 198.

[The Vice-Chancellor:—It is clear that the words, "to be paid," do not apply to the children. In the original will, the words, "to enable him to assist such of the children of my deceased brother Francis Benson, as he, the said A. Benson, may find deserving of encouragement," are in a parenthesis; and, admitting that those words create a trust, what words are there to connect the subsequent gift with the former?]

If there is any portion of the stock, as to which no trust is created for the children of Francis Benson, then we submit that Arthur Benson takes a life interest only in it, and that the capital is undisposed of, and, consequently, belongs to the testator's next of kin. It is clear that the

* 1 Atk. 469. See Sugd. Treat. Pow. 3d edit. 318, where the cases above cited are observed upon. See also 16 Ves. 47.

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bequest to Mary Parsons and Sarah Acres is specific and not residuary; and there are no words in that clause of the will which can be held to pass the stock. The context of the will explains what the testator meant by the word "moneys." Besides Hotham *v.* Sutton, 15 Ves. 319, decided that stock will not pass by the word "money."

The Vice-Chancellor:—The first question in this case, is whether a trust is created, for the benefit of the children of Francis Benson, by the following clause in the will of his brother, John Benson: "And the residue and remainder of the said dividends to my brother Arthur Benson, (to enable him to assist such of the children of my deceased brother Francis Benson as he, the said Arthur Benson, shall find deserving of encouragement), to be paid to the said several persons." The words, "to enable, &c." are, as I before observed, in a parenthesis; and consequently the words "to be paid, &c.," apply, not to the children of F. Benson, but to the persons to whom the testator had given annuities in the preceding part of his will.

I am not aware that there is any case, where there is a gift to a party, apparently in terms which would make him the taker so as to have a benefit, and words have been connected with it which express the reason for which it was given, such as these, "to enable him to assist such of the children of my deceased brother Francis Benson as he, the said Arthur Benson, shall find deserving of encouragement," in which the court has held that a trust was created for those persons. The cases that have been cited, are cases where property has been given to a legatee, with a power to select one or more of a specified class of persons, to take the property after the decease of the legatee. As in Harding *v.* Glyn, where the testator gave the lease of his house and certain other articles, to his wife, but desired her, at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of. In such cases the court has held, if the power be not exercised, that a trust is created in favour of those persons who were pointed out as the objects of the power. In the case of Brown *v.* Casamajor, the words were: "I also give, to the said Humphrey Sibthorp, the further sum of 7000*l.* the better to enable him to provide for his younger children; and, if he should depart this life before, or I be rendered incapable, in case of accident, to make any alteration, then I give the said sum of 7000*l.* to Susanna Sibthorp, his wife, for the purposes aforesaid, and if both of them should die before me, I give the same among the younger children." In that case, the court held that the father was entitled to the interest of the 7000*l.*, for his life; and that his younger children had an interest in the principal. It seems rather extraordinary that any question should have arisen upon that bequest; for it is perfectly plain that the father was entitled to the fund for his life, and that he had a power to dispose of the principal in providing for his younger children; and, if he did not exercise that power, then the fund was given, expressly, to the younger children. In the case of Brown *v.* Higgs, the testator expressed himself thus: "I authorise and empower my said nephew, John Brown, to receive the remaider of the rent that arises from my estate at Brize Norton, over and above the 100*l.* I have directed to be paid to my loving wife Rupertia Brown, and to dispose of it in the following manner, that is to say, to take 100*l.* of it, every year, to his sole and separate use, and to employ the remainder of the said rent, after paying the annual rent to the college, and the fines for the renewal of the leases, and other necessary expenses

about the farms, to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving, and that will make the best use of it, or to the children of my nephew William Augustus Brown, if any such there are or shall be." John died in the lifetime of the testator; and it was held that a trust was created for the children of Samuel, and, according to Lord Eldon's construction, for the children of William Augustus Brown also, about which, I think, there could not be any doubt.

I do not see that there is any similarity between cases of that kind and the present case, where, in the first instance, the gift is to Arthur Benson, and then the testator has added apparently the cause of the gift: "to enable him to assist such of the children of my deceased brother Francis Benson, as he the said Arthur Benson shall find deserving of encouragement." It is clear to me that the testator intended to increase the funds of Arthur Benson, whereby, if he pleased and thought that there were any of the children of Francis Benson that deserved encouragement, he might be better able to assist them. I do not see any reason for departing from the natural import of the words used by the testator: and, more especially, as the natural construction of those words is fortified by what follows. The testator goes on to say: "and upon the demise of the said Sarah Acres and Mary Parsons, and her three children, and the widow of my brother Francis Benson, or any of them, I bequeath such persons' proportion of the before-mentioned dividends, to my said brother Arthur Benson, to be at his disposal." That, according to my apprehension, is a complete gift for the benefit (that is, for the free disposition) of Arthur Benson; and, if the objects of the testator's bounty, were not Arthur Benson, but the children of Francis, how does it happen that there is no allusion made to the children of Francis in this bequest. My opinion therefore is, that the words which have been relied upon, are not, of themselves, sufficient to raise a trust for the benefit of the children of Francis Benson.

The next question is, what is the quantity of estate and interest which Arthur Benson takes in what is given to him? The two clauses which I am going to advert to, throw light upon each other. The testator, in the first instance, has given a fund, in one long sentence, which ends with the words: "but the principal to remain in the bank." That sentence commences with giving an annuity to Sarah Acres, who was the testator's adopted child, another annuity to his niece, Mary Parsons, who was one of the children of his brother Francis, and then the will proceeds thus: "and, after her decease, to be equally divided amongst her three children, or the survivor or survivors of them; and to the widow of my brother Francis Benson, 50*l.* per annum, out of any money arising from whatever dividends I may die possessed of in the Bank of England." I should have thought that those words, if they had stood alone, would have carried to Sarah Acres, the widow of Francis Benson, and the three children of Mr. Parsons, the absolute interest in the funds requisite for payment of their respective annuities. But afterwards the testator has explained what he meant by these words, for he says: "And upon the demise of the said Sarah Acres, Mary Parsons, and her three children, and the widow of my brother Francis Benson, or any of them, I bequeath each such person's proportion of the before-mentioned dividends to my said brother Arthur Benson, to be at his disposal." If, as has been contended, the testator meant to give his brother a life interest only in his

stock, a portion of it would be, first of all, to be enjoyed, for life, by the niece of his brother, and then by persons who were the great nieces and great nephews of his brother; so that, as to that portion, the brother would take a life interest, in remainder, after the death of persons who were in the second generation from him. *Primâ facie*, that appears to be a very extraordinary intention to have entered into the testator's mind; and it seems to me to fortify the conclusion which I have come to, as to the effect of this disposition, namely, that the testator, when he so gave, in remainder, to his brother Arthur, the fund that was to produce the annuities, meant to give him the absolute interest in that fund. If then the testator intended to give, to his brother, the absolute interest in the fund which was to produce the annuities, it aids the conclusion that when, in the preceding part of the sentence, he says: "the residue and remainder of the said dividends to my brother Arthur Benson," he means to give him the absolute interest, that is, the capital that was to produce the dividends.

I am therefore of opinion that what the testator meant, was that, in the first instance, Arthur Benson should take, absolutely, so much of the stock as might not be wanted to answer the annuities given to Sarah Acres, Mary Parsons, and the widow of his brother Francis, and that, after the death of the annuitants, Arthur should take, absolutely, the *corpus* of the fund out of which those annuities were to arise.

That being my opinion, there is no other question in the cause that I have to decide.

Dummer *v.* Pitcher.

5 *Simons*, 35.

A testator, before making his will, transferred two sums of four per cents and five per cents, which were then the whole of his funded property, into the joint names of himself and his wife. By his will he bequeathed all *his* funded property or estate of what kind soever, to trustees, in trust for his wife for life, and, after her decease, in trust (amongst other things) to pay certain legacies of four per cent stock, amounting, within 50*l.*, to the stock of that description, which he had so transferred; and he gave the residue of his estate to A. & B. He afterwards purchased further sums of five per cents, in the names of himself and his wife, and died in her lifetime, having no stock except that before-mentioned, exclusive of which his property was not sufficient to pay his legacies: Held, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took, under the will, in certain parts of the testator's property.

December, 19, 1831.

THOMAS CASS, the testator in this cause, being possessed of 2500*l.* four per cent bank annuities, and 2000*l.* five per cent bank annuities, in October, 1811, and February, 1812, transferred them into the names of himself and his wife. He made his will, dated the 19th of July, 1814,

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in the following words: "First of all I give my leasehold house and premises, situate in South-street, South Audley-street, Grosvenor-square; also my leasehold house and premises situate and being in Curzon-street, May-fair; also my leasehold house and premises situate and being in Chapel-street West, May-fair; and likewise my leasehold house and premises situate and being in Henrietta-street, Cavendish-square, St. Mary-le-bone, and all the rents and proceeds of the aforesaid four houses, together with all the interest of all *my* funded property or estate, of what kind soever, or wheresoever the same, or any part thereof, may be found, I give to Samuel Dummer, of Beech-street, in the city of London, and William Thomas Sweet, of South Audley-street aforesaid, upon trust, and to the intent and meaning, that the said Samuel Dummer and William Thomas Sweet, or the survivor of them, their heirs or assigns of such survivor, do and shall, from time to time, and at all times hereafter, pay the net rents and issues of the aforesaid four houses and premises, and also the interest, proceeds and profits of all my funded property, and all my estate, of whatsoever kind, as soon and as often as the same, or any part thereof, may become due and payable, into the hands of my beloved wife, Mary Cass, for her own proper use and benefit, for and during her natural life, or permit her to receive the same for her sole and separate use and benefit, and her receipt shall be good and sufficient discharge therefor; and, from and immediately after the death of my beloved wife, Mary Cass, then, upon trust for the said Samuel Dummer and William Thomas Sweet, or the survivor of them, the executor, administrator or assign of such survivor, I give and bequeath in manner following, that is to say, first, to my nephew, Joseph Pitcher, senior, I give and bequeath the sum of 300*l.* stock four per cent, together with my leasehold house and premises, situate and being in Henrietta-street aforesaid; also I give, to my nephew Joseph Pitcher, junior, the sum of 300*l.* stock four per cents; also I give and bequeath to my great nephew, William Pitcher, the sum of 300*l.* stock four per cents; also I give to my great niece, Mary Boyden Bevis, the sum of 300*l.* stock four per cents; also I give and bequeath to my niece Mary Buren, the sum of 200*l.* stock four per cents; also I give and bequeath to my niece, Sarah Giddings, the sum of 200*l.* stock four per cents; also I give and bequeath to my sister-in-law, Margaret Webb, the sum of 200*l.* stock, four per cent; also I give and bequeath to my two sisters-in-law, Ann Morton and Margaret Webb, an annuity of 50*l.* each and either of them, and to be paid them out of my estate, in half-yearly payments, that is to say, 25*l.* to each of them in each half-yearly payment, and the survivor of them, the said Ann Morton and Margaret Webb, shall and may have the whole annuity of 100*l.* during her natural life; and, after the death of both my sisters-in-law, Ann Morton and Margaret Webb, I then give, and my will is, that the one moiety of the principal sum of 2000*l.*, from which the annuity of 100*l.* proceeds, I give to the children of my niece, Mary Ann Dummer, or their heirs, share and share alike, and the other moiety of the aforesaid principal sum of 2000*l.*, after the death of my said two sisters-in-law, I give, and my will is, that the said principal sum of 1000*l.*, being the moiety of 2000*l.* aforesaid, I give to the children of my nephew, Joseph Pitcher, senior, born by his first wife, Elizabeth Pitcher, share and share alike, or to their heirs, in like manner. Also I give the sum of 500*l.* stock, four per cents, to my great nephew, Thomas Cass Pitcher, but if

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the said Thomas Cass Pitcher should die single or without issue, I then give, and my will is, that the said sum of 500*l.* herein willed or bequeathed to him, said Thomas Cass Pitcher, as aforesaid, shall then be equally divided between his, said Thomas Cass Pitcher's two brothers, Joseph Pitcher, William Pitcher, and his sister, Mary Boyden Bevis, or the survivor of them and survivors, share and share alike, or their heirs or assigns; also I give, to my niece, Mary Ann Dummer, my leasehold house and premises situate and being in South-street, South Audley-street, Grosvenor-square, which house the said Mary Ann Dummer shall have and enjoy immediately after the death of my beloved wife, Mary Cass; also I give, to my brother-in-law, Richard Webb, the sum of 100*l.* four per cent: also I give to my god-son, Thomas George Law, the sum of 50*l.* stock, four per cent; also I give and bequeath, to the aforesaid Samuel Dummer and William Thomas Sweet, the sum of 200*l.*, upon trust that they or one of them, their heirs or assigns, pay to the board of managers for the time being of the day school of instruction and industry, situate in South-street, South Audley-street, Grosvenor-square, and which said sum of 200*l.* of lawful money of Great Britain, I desire may be paid out of my estate, and be applied for the better support of the said charity school: and also I give and bequeath, the sum of 100*l.*, to the school of instruction or charity school situate and being in Knightsbridge, which said sum of 100*l.* to be paid out of my personal estate; and my gold watch I give to my great nephew, Thomas Cass Pitcher aforesaid: and as to my other two leasehold houses and premises, situate as above, and not before willed or given away, with the appurtenances thereunto belonging, together with all my household goods and furniture, my will is that they, and every one of them, be sold by auction, for the most money that they may fetch; and my will is that the said Samuel Dummer and said William Thomas Sweet, may retain, for their own proper use and benefit, the sum of 50*l.* each and either of them, for their trouble and performance in the duty of fulfilling the trust herein reposed in them, their heirs or assigns. All the rest residue and remainder not hereby before willed, I give to the aforesaid Thomas Cass Pitcher and the aforesaid Mary Ann Dummer, that may be found of my estate; and I, the testator, Thomas Cass, do nominate, constitute and appoint the said Thomas Cass Pitcher and the said Mary Ann Dummer for my sole executor and executrix to this my will and testament."

In November, 1814, and May, 1816, the testator purchased two further sums of 200*l.* and 100*l.* five per cent bank annuities, and had them transferred into the names of himself and his wife.

The testator died on the 10th of September, 1817: and his executor and executrix having renounced probate of his will, letters of administration with the will annexed, were, in November following, granted to Samuel Dummer and William Thomas Sweet.

The testator's personal estate, exclusive of the before-mentioned sums of stock (all of which were, at his death, standing in the joint names of himself and his wife,) was of very little value; and, together with those sums, it was not more than sufficient to pay his debts, funeral and testamentary expenses and legacies, and to perform the trusts of his will. The five per cent bank annuities were afterwards converted, by act of parliament, into 2520*l.* new four per cents, and the four per cent bank annuities, into the same amount of new three and a half per cents.

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In 1824 Mrs. Cass sold out 500*l.*, part of the four per cents, and paid over the proceeds to Thomas Cass Pitcher, and he gave to her his promissory note for securing 500*l.*, with interest at four per cent.

Mrs. Cass received the rents of the testator's houses, during the continuances of the leases, three of which expired in 1823, and the other in 1828. By her will, dated the 4th of January, 1830, after giving some small specific and pecuniary legacies, she gave all other her moneys, goods, and chattels, estate and effects, of every nature and kind, to her niece, Mary Ann Dummer, and appointed Samuel Dummer her sole executor. Mrs. Cass died on the 8th of January, 1830. At her death, all the sums of stock, except the 500*l.* which had been sold as before-mentioned, remained in the joint names of her and her husband; but, after her death, those sums were sold out by Samuel Dummer.

In July, 1830, Samuel Dummer and Mary Ann his wife, filed a bill against Thos. Cass Pitcher and Wm. Thos. Sweet, alleging that Mrs. Cass, by surviving her husband, became absolutely entitled to the sums of stock, and praying for a declaration to that effect, and no part of those sums constituted personal estate of the testator, or was applicable towards the performance of the trusts of his will, and that an account might be taken of his personal estate, and that the same might be applied in a due course of administration.

In 1831 Thos. Cass Pitcher filed a cross bill against Mr. and Mrs. Dummer and Mr. Sweet, alleging that the testator had caused the sums of stock to be transferred into the joint names of himself and his wife, with a view to the bequests and dispositions of his will, and to enable his wife to receive the dividends thereof, which he, through age and infirmity, was incapable of doing; that the 500*l.* was paid to him, T. C. Pitcher, by Mrs. Cass, as and for the reversionary legacy to that amount, given to him by the testator's will, and that he gave her his promissory note, for securing the interest to her, for her life, and to provide against the contingency, or supposed contingency, to which such legacy was subjected by the will. The cross bill prayed that the trusts of the testator's will might be carried into execution, and that it might be declared that the sums of stock formed part of his assets at the time of his death; or, if the court should be of opinion that those sums vested absolutely in Mrs. Cass, by survivorship, then that it might be declared that she was bound to elect whether she would take the benefits given to her by the will, or reject the same, and that she did accordingly elect to take such benefits, and was bound to permit the said stock to be applied in execution of the trusts of the will, according to the intent of the testator, and that Samuel Dummer might be restrained from proceeding with an action which he had commenced, against the plaintiff, Thomas Cass Pitcher, on his promissory note, the plaintiff offering to account, as part of the testators assets, for the proceeds of the stock sold out and lent to him, and to appropriate and pay the same as the court should direct.

Mr. Knight and Mr. James Russell, for Mr. and Mrs. Dummer, contended, 1st, that the sums of stock became, upon the testator's decease, the absolute property of his wife, there being no declaration of trust, nor any circumstances appearing either from the answers or the evidence in the cause, from which it could be collected that the testator intended that his wife should hold the stock subject to any trust, or which afforded any ground for an inquiry upon the subject: 2d, That the bequest, in the

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testator's will, of his funded property, was not specific, and, consequently, that there was nothing in the will to raise a case of election against his widow. Parrott *v.* Worsfold, 1 Jac. & Walk. 594.

Mr. Treslove and Mr. Bligh, for T. C. Pitcher, said that the testator, when he made the transfers of the stock, had both the legal and equitable ownership in it, and therefore the inference was that he had intended his wife to be a trustee of it; that it appeared, by the answer of Mr. and Mrs. Dummer, that the testator's property, exclusive of his leasehold houses and stock, was very inconsiderable, and did not exceed 83*l.*: that the leases of three of the houses expired in 1823, and the lease of the fourth, in 1828: that the testator had no funded property, except what had been transferred into the names of himself and his wife: that the transfers were made, only to enable the wife to receive the dividends, which the testator, on account of bodily infirmity, was unable to do: that the legacies of four per cents given by the will, amounted to 2450*l.*, which was within 50*l.* of the sum of four per cents standing in the names of himself and his wife, and the residue was given to T. C. Pitcher and Mrs. Dummer: that the will itself was a sufficient declaration of trust, or, at all events, when coupled with the answers and evidence, afforded sufficient ground for an inquiry as to the circumstances under which the stock was transferred into the joint names of the testator and his wife: that if the court should hold that there was no ground for concluding that the husband intended his wife to be a trustee of the stock, then that the disposition of it made by the testator, was sufficiently specific to raise a case of election against her, she having received the rents of the testator's houses, and having taken other benefits under his will.

The Vice-Chancellor:—The first question is, whether it is competent to me now to decide the points raised by the pleadings in this cause, or whether I ought not to direct further inquiry to be made upon the subject. On one side it has been alleged that the wife was a trustee, for the husband, of the sums of stock which he caused to be tranferred into their joint names; and, on the other, that the husband did not intend his wife to hold the stock subject to any trust. Now the *onus* of proving the existence of a trust, lies on those who allege it. But, in this case, there is nothing to show that the husband intended that the transfers should have any operation but what they legally had; and, consequently, it is not competent to me to direct any inquiry as to the circumstances under which those transfers were made. On the first question, therefore, my opinion is, that Mrs. Cass, by surviving her husband, became absolutely entitled to the sums of stock.

With respect to the second question, I have to observe that it is apparent, from the language used by the testator at the commencement of his will, that he intended to dispose of all his property, generally. He first mentions his leasehold houses, and then he uses words which would comprehend any stock or any property; and there is not, in any one of the gifts, any reference to stock which he supposed himself to have at the time when he made his will. In the first place, he was not owner of the stock, so as to be able to dispose of it; in the next place, the disposition which he has made of his funded property, is not sufficiently specific to raise a case of election.*

* Affirmed by the Lord Chancellor, 16th Dec. 1833.

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5 Simons, 44.

Testator devised all his real estates to trustees, in trust to convey his lands in W. to A., when, and so soon as he should attain twenty-one, but in case he should die under that age and without leaving issue, then over; and when B. should attain twenty-four, in trust to convey the rest of the real estates to him, *on his giving security for the annuities given by the testator, and executing certain deeds, to the satisfaction of the trustees;* but in case B. should die before he attained twenty-four, without leaving issue, then over. A. & B. were both infants at the testator's death: Held, that A. took a vested interest in possession, in the lands in W., but that B.'s interest in the rest of the estates was contingent on his attaining twenty-four, and doing the acts required.

December 13, 19, 1831.

JAMES ACKERS, being, as the bill stated, at the time of making his will and of his death, seised in fee simple, or otherwise well entitled to, various freehold lands, tenements, chief-rents and hereditaments, situate in the county of Lancaster and elsewhere, by his will, dated the 13th of April, 1822, and duly executed and attested, directed his debts, funeral expenses, and the charges of the probate and execution of his will, to be paid out of his personal estate; and he gave to his wife, Ann Ackers, the use and enjoyment of his capital messuage or dwelling-house, with the land and appurtenances thereunto belonging, situate at Lark-hill, within Salford, in the county of Lancaster, which he held by lease under the Earl of Derby, and also the use of his household and other goods, furniture, plate, and certain other articles, which should be found in and about his said dwelling-house at his decease; and, in case of the decease of his wife, before his interest in the premises should expire, then he directed that his said dwelling-house, land and premises, and household goods and chattels, should revert to his executors, and be applicable to the purposes of his will thereinafter set forth concerning his personal estate. He then gave several pecuniary legacies, which he directed to be paid upon the expiration of three months after his decease. And he gave and devised all his freehold and copyhold messuages, lands, tenements, and moieties, parts and shares of messuages, lands, tenements, rents and hereditaments whatsoever and wheresoever situate, standing, lying, arising and being, in the United Kingdom, and also all and every his leasehold messuages, lands, tenements, rents and hereditaments, and all other his real and personal estate and effects, not thereinbefore disposed of, unto and to the use of Edward Hobson and Benjamin Williams, their heirs and assigns, and for such other estate or estates as he had therein respectively, according to the nature and quality thereof, upon trust as to his said lands, hereditaments and real estate, that they should keep the same in good repair, and let, set and manage the same to the utmost advantage; and upon further trust, and he thereby directed, that it should be lawful for the trustees, at any time or times after his decease, to sell all or any parts of his said real estates (except the messuage and premises devised to his wife, during her interest therein, and also the land, hereditaments and premises

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therein after devised to his god-son, George Holland Ackers), and to convey the fee-simple thereof to any person or persons whomsoever, either in parcels for building upon or otherwise improving the same, at such yearly chief or other rents, as his trustees should think fit; and that, when any of the said premises should be sold, the rents to be reserved upon such sales, should be vested in the trustees upon the trusts in his will expressed concerning his real estate. And he empowered his trustees to exchange any of his said lands and hereditaments, for other lands, and to make partition of any lands of which he was joint proprietor: and he directed that the lands to be taken in exchange or divided, should be vested in his trustees upon the trusts of his will, and that the moneys to arise from the sale or sales of his estates should be added to his personal estate: and he declared that the receipts, of his trustees, for such moneys, should be sufficient discharges to the persons paying the same. And, as to, for and concerning his personal estate, money in the public funds, and money out at interest, securities for money, *rents, arrears of rent*, goods, chattels and effects of what nature or kind soever not thereinbefore specifically bequeathed, he thereby gave and bequeathed the same and every part thereof, to the trustees, their executors, administrators and assigns, upon trust, in the first place, to pay, thereout, to his wife, an annuity of 3000*l.* for her life, and a further annuity of 200*l.* a year, in the event therein mentioned, in lieu of dower and thirds and all other claims on his property. The will then proceeded thus:

"And as to, for and concerning all my messuages, lands, and premises, situate, lying and being in Wheelock in the county of Chester, purchased by me from Mr. Hillidge and Mr. Lockett, they, my said trustees and the survivor of them and the heirs of such survivor, shall stand seised and be possessed thereof, in trust, and to the intent and purpose *to assign, convey and assure the same unto my god-son George Holland Ackers, eldest son of my nephew George Ackers, when and so soon as he, my said god-son, shall attain his age of twenty-one years;* and also do and shall pay unto my said god-son, George Holland Ackers, the sum of 7000*l.* of like lawful money, at and upon his attaining his said age of twenty-one years. *But, in case my god-son, George Holland Ackers, shall depart this life before he attains the said age of twenty-one years, without leaving issue of his body lawfully to be begotten,* then and in such case the said messuages, lands and premises in Wheelock, aforesaid, hereinbefore given and devised to him, together with the said sum of 7000*l.*, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof hereafter expressed and contained."

"And, as to the rest, residue and remainder of my personal estate, not by this my will specifically disposed of, upon trust that they, my said trustees, and the survivor of them, his executors or administrators, do and shall, after payment thereout of all my just debts, funeral and testamentary charges, and all annuities and yearly sums of money, and legacies, given by this my will, together with all such sum and sums of money as may be necessary for the management and repairs of my real and personal estate, to invest the overplus in the parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be altered and varied as they, my said trustees or trustee, shall think proper, and the resulting income and produce thereof may be accumulated by way of compound interest, until James Coops, son of

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Ann Coops (sometime ago residing in Salford), and which said James Coops was born on or about the 4th day of August, 1811, shall attain the age of twenty-four years; then upon trust that they, my said trustees and the survivor of them, and the heirs, executors and administrators of such survivor, shall *convey, assign, transfer, pay and make over*, by proper and effectual conveyances, transfers, payments and assurances in the law, *unto the said James Coops* (*upon his giving such security and executing such deeds and assurances as to the satisfaction of the said trustees, or the trustee for the time being, or their or his counsel, shall devise, for the regular payment of the several annuities hereinbefore bequeathed*) all the legal estate and interest of and in all my freehold, copyhold and leasehold messuages, lands, tenements, rents and hereditaments, moieties, parts and shares of messuages, lands, tenements, rents and hereditaments, situate, standing, lying, arising and being in the United Kingdom of Great Britain and Ireland, *and all other my real and personal estate and effects whatsoever and wheresoever not hereinbefore given, devised and bequeathed*, subject, nevertheless, to the life estate of my said wife, in my said capital messuage or dwelling-house, garden, land and premises, and the household goods and chattels thereto appertaining and belonging." The testator then directed his trustees to place James Coops at school, and afterwards at one of the universities, and to allow him not exceeding 800*l.* per annum, out of the income of the testator's personal estate, until he attained twenty-one, and then not exceeding 1500*l.* per annum until he attained twenty-four. The testator then directed that James Coops should, from and after his decease, take the surname of "Ackers" only. "*But in case the said James Coops shall depart this life before he attains the said age of twenty-four years, without leaving issue lawfully begotten*, then, upon trust that they, my said trustees and the survivor of them, and the heirs, executors and administrators of such survivor, do and shall, in like manner, assign, transfer, pay and make over, by proper conveyances, payments and assurances, subject nevertheless to the payment of the said annuities and yearly sums of money hereinbefore bequeathed, and also to the life estate of my said wife in my house and premises at Lark-hill, unto such son of the body of my said nephew George Ackers lawfully to be begotten and hereinafter to be born (exclusive of my said god-son George Holland Ackers and his heirs), when he shall attain the age of twenty-four years, all that and those my real and personal estate of what nature or kind soever: and, in default of such son, in trust for the third, fourth, fifth, sixth, and all and every other son and sons of the body of my said nephew George Ackers lawfully issuing and hereafter to be born, successively and in remainder one after another, as they and every of them shall be in priority of birth and seniority of age, the eldest of such sons and his heirs being always preferred, and to take before the younger of them and their heirs, such son and his heirs lawfully begotten, nevertheless, only to take when he shall have attained the age of twenty-four years;" and in default of such issue, in trust for the daughters of George Ackers and their heirs, equally, as tenants in common, such daughters nevertheless only to take when they should have attained twenty-one: and in case George Ackers should die without leaving any son thereafter to be born, who should attain twenty-four, or any daughter who should attain twenty-one years of age, then upon trust for George Holland Ackers when he should have attained the age of twenty-four years. But in case there

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should be no such son or daughter of the testator's said nephew thereafter to be born, or that G. H. Ackers should die before his attainment of the age of twenty-four years without issue lawfully to be begotten, upon trust that his trustees should equally divide the whole of his real and personal estate, amongst the children who should be then living of the testator's late uncle and aunts, T. Singleton, Elizabeth Hatsall and Ann Bayley. And the testator appointed Edward Hobson and Benjamin Williams the executors of his will.

Ann Ackers, the testator's wife, died in his lifetime. The testator died in May, 1824, leaving the plaintiff, Sophia Phipps, his heir at law, and George Holland Ackers and James Coops, both infants, him surviving.

Hobson having renounced and disclaimed, the bill was filed against Williams, G. H. Ackers, James Coops (who had taken the name of Ackers), and the children of the testator's uncle and aunts, mentioned in his will, who were living at his decease. It insisted that the plaintiff was entitled to the rents of the Wheelock estate, from the testator's death, till G. H. Ackers should attain twenty-one, and to the rents of the whole of the testator's freehold estates, devised to James Ackers, from the testator's death until James Ackers should attain twenty-four: and it prayed for a declaration to that effect; and that an account might be taken of the rents of the estates which had been received, by Williams, since the death of the testator, and that what should be found due from him, might be paid to the plaintiff, and that proper directions might be given for the future payment of such rents, until such respective times, and that a receiver might be appointed.

G. H. Ackers and James Ackers put in, separately, general demurrers to the bill.

Sir Charles Wetherell, Mr. Knight and Mr. Wright in support of the demurrer of James Ackers:

The rule of law is, that if an estate be devised to a person when he shall attain twenty-one, and, if he dies under that age and without issue, then over, the devisee takes an immediate vested interest, on the testator's death; otherwise, if the devisee died under twenty-one, his issue, in whose favour an intention is expressed by the devise, would be disappointed. But, independently of the rule of law, no one can look at the general context of this will, without seeing that the testator meant the rents and profits of his real estates, and the interest of his personality, to form an accumulating fund until James Ackers should attain twenty-four, subject, however, to the provision for his maintenance and education.

The language of this will is very inartificial, but there are many expressions in it, which show an intention on the part of the testator, not to die intestate as to any part of his property. The testator, at the commencement of his will, gives all his freehold, copyhold and leasehold estates, and all other his real and personal estate, to his trustees; every thing, therefore, is given to them; and, under the trust for sale, the trustees may convert the whole, except the Wheelock estate, into personality. The clause directing the accumulation, when taken in connection with the general context of the will, incontestably shows that the testator intended that the rents and profits of his real estate, from the time of his death until James Ackers should attain twenty-four years of age, should be

accumulated together with the income of his personal estate: and, after directing the accumulation to take place until James Ackers should attain twenty-four, he orders that all his lands and hereditaments, *and all other his real and personal* estate, shall then be conveyed, assigned, paid and made over, to James Ackers. It is quite clear that these words pass the intermediate fruits of the testator's real as well as personal estate; and it would be quite defeating the intention and language of the will if the court were to hold that any portion of the property was to escape the operation of those large, and, indeed, universal words. Cambridge *v.* Rous, 8 Ves. 12; Butler *v.* Freeman, 3 Atk. 58. Although this latter case related to personal estate, the reasoning of the Lord Chancellor is equally applicable to personal estate.

[The Vice-Chancellor:—Do you contend that the accumulation clause extends to anything but the personal estate? I do not find, in any part of the will, a direction that the rents of the real estates shall be accumulated.]

Independently of the expressions in the will which we have relied upon, the devise in favour of James Ackers, would, of itself, give him a right to the intermediate rents: and consequently it is not necessary for us to do more than refer to Boraston's case, 3 Rep. 19; Bromfield *v.* Crowder, 1 New Rep. 313; Doe *v.* Nowell, 1 M. & S. 327; 5 Dow, 202; Doe *v.* Lea, 3 T. R. 41; Goodtitle *v.* Whitby, 1 Burr. 228. See also Manfield *v.* Dugard, 1 Eq. Ab. 195; Doe *v.* Moore, 14 East. 601; and Duffield *v.* Duffield, 3 Bligh, New. Ser. 260.

[The Vice-Chancellor:—According to your argument, James Ackers would take the intermediate rents of the Wheelock estate, until George Holland Ackers attains twenty-one.]

We think that he would; but we have nothing to do with the rights of G. H. Ackers. It is sufficient for us to contend, upon this demurrer, that the heir at law does not take anything.

Mr. Pepys and Mr. West, for the plaintiff:

In Bromfield *v.* Crowder, Doe *v.* Nowell, and the other cases of the same class, there were direct gifts to the devisees, on their attaining twenty-one. The decisions in all those cases proceeded on this, that the attaining of twenty-one was not a condition precedent.

The right of James Ackers to the intermediate rents, depends upon the solution of the following question, namely, is there, or not, a condition precedent annexed to the estates which he is to take? In the first place, the testator says that he is to have nothing unless he attains the age of twenty-four years; and, in the next place, if he does attain that age, he is to perform certain conditions, namely, to give security, in the manner pointed out by the will, for the due payment of the annuities, before the estates are to be conveyed to him. What can more plainly create a condition precedent, than such a form of devise? Independently of the acts to be done by James Ackers, there are no words of gift to him, except in the direction to convey. The trustees have the estate; and, if they find James Ackers answering a certain description at a certain time, and if they find him willing to comply with certain directions which the testator has imposed on him at that time, then, and then only, the trustees are to convey to him. If there had been no authorities upon this subject, and the court had been called upon to give its judgment merely on the words used by the testator, no doubt could be entertained as to their effect. In Duffield *v.* Duffield, 3 Bligh, New Ser. 260, the

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devises in favour of the children of Mr. and Mrs. Duffield, were held to be contingent. In that case the testator, by a codicil, gave all his freehold property, to the eldest son of his daughter, on his attaining twenty-one and changing his name to Elwes. There, as in this case, an act was to be done. The son was to change his name to Elwes. We admit that the claim of the heir at law to the intermediate rents, was disallowed by the house of lords; but it was disallowed on the ground that there was a residuary clause. For, when the case was first sent to the judges, the residuary clause was omitted, and they decided that the heir at law was entitled to those rents; but, upon that omission being supplied, the judges determined for the residuary devisee. It is quite sufficient for our purpose that, on neither occasion, were the estates held to be vested. The case of Chambers *v.* Brailsford, 18 Ves. 368, is also precisely in point.

Next: there is not a single expression in the will, from which it can be collected that the testator meant the rents and profits of his real estates to be accumulated. When he directs the legal estate of and in all his freehold, copyhold and leasehold messuages, lands, tenements, rents, and hereditaments, to be conveyed, he means the legal estate in the chief rents of which he was seised. In a preceding clause, he uses these words, "rents, arrears of rent," and he devises his rents, together with his other real estates, to the trustees, in trust to sell. It is clear, therefore, that the testator, by the word "rents," meant chief rents. As to the words: "All other my real and personal estate," which have been so much relied on by the counsel for the defendant, it cannot be contended that the intermediate rents pass under the words "personal estate." Neither can they pass under the words, "all other my real estate." Those words apply to other real estates of which the testator was seised, and not to the intermediate rents, which are not real estate, but the profits of real estate.

James Coops is now an infant, and has no children, therefore the question does not arise, what interest his children would take if he died under twenty-four, leaving children. At the present moment, there is nobody who can take these interim rents, under the will; the consequence is, that this suit is properly instituted by the heir at law, claiming those rents in the absence of any gift to any other person.

Sir E. Sugden and Mr. Lynch, in support of the demurrer of G. H. Ackers:

The testator, in the first place, gives all his real estate to his trustees, so as to vest in them the legal fee: and the personal estate is given to them absolutely. The trustees have power to convert into money all the real estate, except that which is given to G. H. Ackers, and that is to remain *in specie*. The first observation that arises upon the clause by which the Wheelock estate and the 7000*l.* are given to G. H. Ackers, is that it is only in case G. H. Ackers dies before he attains twenty-one, without leaving issue, that the Wheelock estate and the 7000*l.* are to sink into and become part of the testator's residuary real and personal estate. How, therefore, can it be said that, from the beginning, the Wheelock estate and the 7000*l.* form part of the residuary estate, when it is only on the happening of a particular event that they are to become part of the residue. If a testator devises an estate to any given object, and says that, upon the happening of a certain event, it shall sink into and form part of his residuary estate, it is plain that, before and up to the happening of

that event, the testator did not intend that it should form part of his residuary estate; otherwise he would have said: "shall again fall into, and again become part of, my residuary estate." It is quite clear, therefore, that this testator meant to take the Wheelock estate and the 7000*l.* entirely out of, and keep them distinct from his residuary estate, until the happening of a particular event. The testator, too, has prohibited the sale of his Wheelock estate. Is it probable that the testator, making these anxious provisions respecting this estate, intended to withhold the enjoyment of it, from the object of his bounty, until the attainment of twenty-one? If G. H. Ackers dies under twenty-one, leaving a child, that child would take the property. But it would be singular that a child should have, before the father attained twenty-one, that which the father was not to have until he attained twenty-one. No provision is made, by the will, for the maintenance of G. H. Ackers; and, if the rents, until he attains twenty-one, fall into the residue, it must be in consequence of some rule of law, and not of the intention of the testator.

The next consideration is, what is the rule of law applicable to this case? The rule is that, whether the estate be in possession or remainder, if it be devised to a man on the happening of an event, as, for instance, his attaining twenty-one, and if there be a devise over in case the party does not arrive at that age, the devisee will take a vested estate before he attains the specified age, and the estate will go over if he does not attain that age; because, it is considered that the words are introduced for the sole purpose of limiting the period when he is to take an indefeasible estate, and not for the purpose of showing an intention of keeping him out of the enjoyment of the property till that particular event happens. In the case of Edwards *v.* Hammond, 3 Levinz, 132; S. C. 1 New Rep. 324, n., the ejectment was brought (as was observed by Lord Ellenborough in Doe *v.* Moore, 14 East, 605), when John Hammond was of the age of fifteen. Now, an ejectment cannot be brought, on a contingent remainder, or an executory devise, but only to recover the possession: and, in order to maintain the action, a right to the possession must be shown, and the recovering in that action shows that the question was not a vesting so as to make the estate transmissible, but a vesting for the purpose of immediate enjoyment, subject only to be divested, if J. Hammond did not live to attain twenty-one. But, if the rule had not been as we have stated, it is clear that, in this case, the estate would have vested; for it is not merely given to G. H. Ackers when and so soon as he shall attain twenty-one: the testator goes on to say: "But in case he shall depart this life before he attains twenty-one, without leaving issue of his body lawfully begotten;" that is not the same event; and therefore, the giving to G. H. Ackers a right in one event, and not limiting the estate over except upon the happening of another event, which, if it happens at all, must occur before the event on which G. H. Ackers is to take an indefeasible estate, render it absolutely necessary that he should take an immediate vested fee, to enable him, if he should die under twenty-one, leaving issue, to transmit the property to his issue. It is perfectly manifest that the testator did not intend the property to go over, if G. H. Ackers died under twenty-one, leaving issue. The issue, however, could not take, except through him; and he must be seised of some estate which they could inherit; it is necessary, therefore, that G. H. Ackers should take an estate in fee. Doe *v.* Moore, *Ub. sup.*; Doe *v.* Nowell,

[Phipps *v.* Williams.—5 Sim. 44.]

1 M. & S. 327; 5 Dow, 202; Farmer *v.* Francis, 2 Sim. & Stu. 505, and 2 Bingh. 151.

The testator, having vested the whole of his estates in his trustees, directs them to convey the Wheeloch estate, to G. H. Ackers, when he shall attain the age of twenty-one years. The direction to convey, is equivalent to a limitation to the use of, or in trust for G. H. Ackers. Goodtitle *v.* Whitby, 1 Burr. 228; Doe *v.* Lea, 3 T. R. 41; Stanley *v.* Stanley, 16 Ves. 491. The case of Chambers *v.* Brailsford, 18 Ves. 368, is an authority in our favour; for there the rents were disposed of by the will, otherwise, the first tenant for life would have been entitled to them. In Duffield *v.* Duffield, the estate was clearly contingent: it was not certain that there would be any son who should attain twenty-one, or that there would be any second son. That case cannot be assimilated to the present. Here there is a direct devise to an individual in existence.

We submit, however, independently of authority, that it was the plain intention of the testator, that G. H. Ackers should take a vested estate in possession.

Mr. Pepys and Mr. West, for the plaintiff:

There is no ground to contend that the testator had a different intention as to G. H. Ackers, from that which he had as to James Ackers. We have shown that the devise to James Ackers, had a condition precedent annexed to it. He was not to take the estates unless he attained the age of twenty-four years, and did certain acts. So G. H. Ackers must attain twenty-one, or, dying under twenty-one, must leave issue, to enable him or his issue to take the Wheelock estate.

Next: the testator devises the Wheelock estate, and bequeaths the 7000*l.* to G. H. Ackers, in one and the same clause. It cannot be disputed that that clause gives G. H. Ackers a future interest in the 7000*l.*: can it then be contended that the same clause gives him a present interest in the Wheelock estate? There can be no reason to suppose that the testator, coupling the real and personal fund together, intended the same person to take a different interest in one, from that which he would take in the other. He clearly meant that G. H. Ackers should have both, on the happening of a particular event, and not till then, and, if that event did not happen, that he should not take either.

In all the cases of this nature, in which it has been held that the devisee took an immediate vested estate, the court has found sufficient, on the face of the will, to make the attaining of twenty-one, not a condition precedent, but a condition subsequent, or, in other words, that the age was the period at which, if the party did not attain it, the estate was to go over. But here there is no gift at all to the individual. There is a direction to convey, and that only at a certain period. So that the attaining of twenty-one, by G. H. Ackers, or leaving issue if he dies under that age, must necessarily take place before the trustees can convey the estate, or pay the 7000*l.* Until one or other of those events happens, no duty is imposed on the trustees. Though G. H. Ackers, when he attains twenty-one, will have a right to call for a conveyance, that does not give him the intermediate rents. In Chambers *v.* Brailsford, where the gift depended upon the direction to convey, the court held that the party to whom the conveyance was to be made, had no title to the intermediate rents. In Stanley *v.* Stanley, Sir W. Grant, M. R., decided

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that the estate continued in the trustees until the party, who had the vested estate for life, attained twenty-one. We ask of the court to make a declaration to the same effect, in this case. In Stanley *v.* Stanley the argument proceeded, in a great degree, on the gift over; but the M. R. said that the event on which an estate was given over, would not determine the event on which it was to vest. 16 Ves. 506.

There is no difference between this case and the case of James Ackers, except that, in the latter case, there are two conditions precedent instead of one; but there is no distinction, in principle, between the two cases.

Mr. Spence and Mr. Hull appeared in support of a demurrer which had been put in by the trustees of the will; but the Vice-Chancellor said that they were trustees for the persons entitled, and therefore ought to have remained neuter. At the conclusion of the arguments, his Honour said that the case was one of considerable importance, and that he should look at the authorities before he decided it.

December 19th.—The Vice-Chancellor:—In this case the bill was filed by the testator's heir, and two demurrers were put in to it, one by George Holland Ackers, and the other by James Ackers; and the question is whether, with respect to the Wheelock estate (which is devised to George Holland Ackers), the heir has any interest at all. The testator has not used any words which amount to a trust for accumulating the rents and profits, either of the Wheelock estate, or the general residue of the real estate, prior to the time when the devisees may become entitled. When the case was argued before me, I had no doubt upon either of the points that were pressed in argument, but I had not an opportunity of looking through the will sufficiently to satisfy myself upon the question whether or not a trust was created for accumulating the rents and profits of the real estate; but my opinion, on perusing the will, is, that there is no such trust. The question then is, with respect to the Wheelock estate, whether or not there is such an immediate devise to George Holland Ackers, as that he is entitled to the rents and profits of that estate. The only difference between this case and Bromfield *v.* Crowder, and the cases of that class, is this, that, in this case, there is a devise of the legal estate, vesting the inheritance in the trustees, upon trust, as to the Wheelock estate, to assign, convey and assure the same to George Holland Ackers, when and so soon as he shall attain his age of twenty-one years; and then it is directed that, in case George Holland Ackers shall depart this life before he attains twenty-one, and without leaving issue of his body, the Wheelock estate should sink into and become part of the residue, that is, should be subject to such a devise as affects the residue of the real estate. Now I do not see any substantial difference between this devise and the devises in Bromfield *v.* Crowder, Doe *v.* Moore, and Doe *v.* Nowell; and my opinion, therefore, is, that, by force of this devise, G. H. Ackers, although he has not attained the age of twenty-one years, does take an immediate vested interest in the estate, liable only to be divested; and the consequence, therefore, is, that he is as much entitled, in equity, to the rents and profits of that estate, as the party who brought the ejectment, during his infancy, in Edwards *v.* Hammond, was held entitled to recover by ejectment. In the course of the argument the case of Chambers *v.* Brailsford was cited. Now, if that case is rightly decided, it must be right only on the particular expressions in the will; and cer-

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tainly the expressions in that will do not coincide with the expressions in this. Therefore, it does not, at all, prevent the application of the doctrine in the cases which I have referred to, to this particular devise of the Wheelock estate.

But the residue of the real estate is given in a manner totally different; because, the legal estate being vested in the trustees, the testator notices the accumulation which he has directed concerning (as I clearly think) the personal estate only, until James Coops shall attain the age of twenty-four years; and then the will proceeds: "Then upon trust, that my trustees, and the survivor of them, and the heirs, executors and administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual conveyances, transfers, payments and assurances in the law, unto the said James Coops (upon his giving such security, and executing such deeds and assurances, as to the satisfaction of the trustees or trustee, or their or his counsel, shall devise, for the regular payment of the several annuities hereinbefore bequeathed), all the legal estate and interest of and in all my said freehold, copyhold and leasehold messuages, lands, tenements, rents and hereditaments, and moieties, parts and shares of messuages, lands, tenements, rents and hereditaments situate, standing, lying, arising and being in the united kingdom of Great Britain and Ireland, and all other my real and personal estate and effects whatsoever and wheresoever." Now, in this case, the mere attainment of the age, is not the only thing by which the testator marks the time at which it shall be determined whether the estate shall vest, or finally become not liable to be divested; but there is a preliminary act to be done, without the doing of which James Ackers never would be entitled to call for the conveyance of the legal estate: for the testator has, in express terms, directed, that the conveyance is to take place upon his giving such security, and executing such deeds as should be satisfactory to the trustees, for the purpose of securing the regular payment of the annuities. That is, in my opinion, clearly a condition precedent; and, until that be performed, James Ackers takes no interest: and my opinion, therefore, is, inasmuch as there is no trust for accumulation of the rents, that the rents and profits of the residue of the real estate belong to the heir in the mean time. The consequence, therefore, is, that the demurrer of George Holland Ackers must be allowed, and the demurrer of James Ackers must be overruled. And as to the demurrer of the trustees, it should never have been put upon the files of the court at all.

Thompson *v.* Guyon.

5 Simons, 65.

A. granted a lease for twenty-one years to B., with a proviso determining the lease and giving A. a right of re-entry, on non-performance of any of the covenants in the lease, and A. covenanted that, at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years. B. paid all his rent, and continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A. in his answer, set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused.

December 15, 1831.

BY an indenture, dated the 21st of October, 1810, Joseph Debaufre, by virtue of a licence, obtained from the lady of the manor of Hampstead, demised, to Samuel Thomas Adams, for twenty-one years from the 25th of March then last, a copyhold messuage and garden, in Hampstead, at the yearly rent of 25*l.*, payable quarterly; and Adams covenanted to cause all the inside and outside wood and ironwork belonging to the premises, to be painted once in every four years of the term, and twice in the last two years, and to keep the premises in repair, and yield them up, in good repair, at the end, or other sooner determination of the term, and to pay the rent quarterly, and also that he would, at his own costs or charges, forthwith insure, and keep insured, during the demise, the messuage, from loss or damage by fire, in the joint names of himself, his executors, administrators and assigns, and of Debaufre, his heirs or assigns, in the Royal Exchange insurance office, London, in the sum of 2500*l.*, and would pay the annual premiums on such insurance, and, within ten days after obtaining such policy or policies, produce the same, if required, unto the said Joseph Debaufre, his heirs or assigns, and deposit and leave the same with him or them, and also deliver and leave, with him or them, the receipt or receipts for the annual premium or premiums paid thereon, within four days after payment thereof, such payment to be made within six days after the quarter-day when such premium or premiums should become due and payable: provided that, if the rent should be in arrear for twenty-one days, or if Adams, his executors, administrators or assigns, should make default in the performance of any of the covenants therein contained, on his and their part, then, and from thenceforth the indenture and demise, and the covenants therein contained on the part of Debaufre, his heirs, executors, administrators and assigns, should cease, determine and become void to all intents and purposes, and that it should be lawful for him and them to re-enter upon the premises, or any part thereof, in the name of the whole, and the same premises to have again, resume, repossess and enjoy, as in his or their former estate, and thereout, and from thence utterly to expel, eject and amove Adams, his executors, administrators and assigns, and all other occupiers thereof. And Debaufre, for himself, his heirs, executors, administrators and assigns, cove-

[Thompson *v.* Guyon.—5 Sim. 65.]

nanted with Adams, his executors, administrators and assigns, that he and they paying the rent, and performing the covenants on his and their parts, should peaceably enjoy the premises during the term, without any interruption from Debaufre, or any person claiming by, through, from or under him; and also, that Debaufre, his heirs or assigns, would, at the expiration of the term, in case the same should not be sooner determined through or in consequence of any act or default on the part of Adams, his executors, administrators or assigns, upon the request, and at the costs of Adams, his executors, administrators or assigns, obtain a further licence to demise, from the lord or lady of the manor, and execute, to Adams, his executors, administrators or assigns, a new lease of the premises, for the further term of fourteen years, to commence at the end of the term of twenty-one years, at the like rent and under the same covenants as were therein reserved and contained, except any covenant, on the part of Debaufre, for executing any further or renewed lease thereof.

The lease, as the bill stated, had been, some time since, assigned to the plaintiff; and, on the 3d of October, 1823, the reversion of the premises, expectant on the determination of the lease, became vested in the defendant, John Guyon, in right of the other defendant, his wife.

The term of twenty-one years expired on the 25th of March, 1831. The plaintiff, however, either by himself or his tenant, continued in the possession of the premises. On the 19th of May, 1831, the defendants commenced an ejectment against the plaintiff, to recover possession of the premises. On the 14th of November, 1831 (before which time the cause had been set down for trial), the bill was filed, stating that the rent and covenants reserved and contained in the lease, had been duly paid and performed; that, since the expiration of the lease, the plaintiff had applied to the defendants to perform the covenant for renewal, but that the defendants, on the ground that some of the covenants in the lease had been broken, had commenced an ejectment on the several demises of themselves and Debaufre, for the purpose of evicting the plaintiff from the premises; that the breaches of covenant for which the action had been brought, appeared, by the particulars thereof, which had been delivered to the plaintiff, to be for not keeping the premises in repair, and yielding them up in good repair at the end of the term, and for not having caused the painting to be done according to the covenant in that behalf. The bill charged that all the covenants in the lease had been strictly performed, except that part of the inside and outside wood and ironwork had not been painted twice within the two last years of the term; that the omission had arisen from accident and inadvertence, in consequence of the plaintiff having mislaid the lease, and forgotten the exact time when it expired; that the plaintiff had, since, caused the painting to be done, as required by the covenant, whereby the covenant had been substantially, though not literally, complied with; that the defendants ought not to be permitted to take advantage of such accidental omission, especially as they had sustained no damage thereby, and the plaintiff was willing to make good such damage, if any, as they had sustained. The bill prayed that the defendants might be decreed specifically to perform the covenant for a renewal, and to obtain a licence to demise, and to grant a lease to the plaintiff, pursuant to that covenant; and, if necessary, that it might be referred, to the Master, to ascertain whether any and what damage had been occasioned by the accidental omission to

paint the premises within the last two years of the term, the plaintiff offering to pay the amount thereof, and that the defendants might be restrained from proceeding with their ejectment, and from commencing any action against the plaintiff for damages, in respect of any of the covenants in the lease.

The defendants, by their answer, said that the rent reserved by the lease, had, from time to time, been paid to them, but without any knowledge or notice, to either of them, of the breaches of covenant after mentioned. They then set forth the particulars of the breaches which had been made of the covenant to paint and repair, and added that all such breaches were subsisting before, at, and after the expiration of the lease, and were, as they were advised, continuing breaches at that time. The defendants further said that, until Midsummer, 1811, the premises were not insured at all, and that they were then insured for one year only: that, from 1812 to 1820, they were uninsured: that, from Midsummer, 1820, to Midsummer, 1828, they were insured in the Phœnix Fire Office, and that, from Midsummer, 1828, to the 25th of December in the same year, they remained uninsured: that, until the 25th of November, 1831, they had no knowledge or notice, whatever, that the messuage had been uninsured at any time during the term: that, on the 28th of April, 1831, a surveyor employed by the defendants, had surveyed the premises, and reported that the messuage had not been painted, either inside or outside, for a considerable time longer than two years: that the messuage had been injured, for want of proper care and attention, and by the repeated breaches of covenant; and they submitted that, under the circumstances, the plaintiff was not entitled to a renewal of the lease.

Mr. Knight and Mr. Wright, for the plaintiff, now moved for an injunction to restrain the ejectment:

The plaintiff has no defence to the action at law: he has a right in equity only, under the covenant to renew. He ought to have an opportunity of trying the question at law; and, wherever there is a reasonable question to be tried, this court will not allow the possession to be changed. The plaintiff does not seek, by his bill, to be relieved against a forfeiture, but to have the covenant to renew specifically performed.* There is a broad distinction between the two cases: and the question is whether the breaches of covenant alleged in the answer, ought to deprive the plaintiff of his right to a specific performance. The term of twenty-one years was suffered to run out, without any ejectment being brought. We admit that the court will not decree an agreement for a lease to be specifically performed, where the tenant has been guilty of waste, or other acts of misconduct. 18 Ves. 63. But here the alleged breaches of covenant have reference to the term of twenty-one years; there is no breach as to the term agreed to be granted. If every covenant in the lease had been broken, and the term had been suffered to continue, the plaintiff would have a clear right to the renewal. The covenant in question is a separate, independent and absolute covenant. The lessor does not covenant that, the tenant paying the rent and performing the covenants, he will renew: but that he will renew unless the prior term is determined.

* See Sanders v. Pope, 12 Ves. 282; Hill v. Barclay, 18 Ves. 56; Doe v. Peck, 1 Barn. & Adol. 428; Doe v. Rowe, 1 Ryan & Moody, 343; Green v. Bridges, 4 Sim. 96, and the cases there cited.

[Thompson *v.* Guyon.—5 Sim. 65.]

[The Vice-Chancellor:—There is a proviso making the term to cease, on breach of covenant.]

It has been decided, at law, that that proviso gives the landlord a right of entry only. Arnsby *v.* Woodward, 6 Barn. & Cress. 519. The house was insured before and at the end of the term; and the answer admits that all the rent has been paid. By the covenant to insure, it was stipulated that the insurance should be effected in a particular office, and in the joint names of the landlord and tenant, and that the tenant should pay the premiums and leave the receipts with the landlord, within certain times. The landlord then cannot be heard to say that he had no notice of the neglect to insure, and a receipt of rent after the times for paying the premiums and leaving the receipts had expired, would be a receipt after notice.

Mr. Pepys and Mr. E. Montagu appeared for the defendants.

But the Vice-Chancellor, without hearing them, delivered judgment as follows:

It is represented, by the answer, that, from Midsummer, 1820, to Midsummer, 1828, the premises were insured in the Phœnix Fire Office, and that, from Midsummer, 1828, to the 25th of December, 1828, they were not insured at all; and the question is whether there is any equity confessed in this answer, in respect of which this court ought to interfere, by injunction, to restrain the action which has been brought to recover the possession of the premises.

The lease contains a covenant on the part of the lessor, that, at the expiration of the term of twenty-one years, in case the lease should not be sooner determined in consequence of any act or default of the tenant, he would grant, to the tenant, a new lease of the premises for the further term of fourteen years: and it is provided that, if default should be made in the payment of the rent, or the performance of any of the covenants in the lease, the indenture and demise, and all the covenants and agreements therein contained, should cease and become void, and it should be lawful for the landlord to re-enter on the demised premises. The fact is, that various breaches of covenant were committed, by the tenant, during the term, which the landlord might have availed himself of to determine the lease, by re-entering on the premises, if he had been conuzant of them. It is expressly sworn, in the answer, that the defendants had no notice of the omission to insure the premises, until the 25th of November last, which is eight months after the expiration of the term. If, during the existence of a lease, such a breach of covenant is committed by a tenant, as that a court of equity would not have interfered to prevent the landlord from taking advantage of the forfeiture of the lease, had he known of the breach and proceeded to determine the lease, he ought not to be placed in a worse situation after the expiration of the term, than he would have been in had he known of the breach and availed himself of it, before the term expired: and, upon that ground, I must refuse this motion.

The plaintiff afterwards gave the defendants judgment in the action, with a stay of execution, and amended his bill, with a view to show that the defendants had precluded themselves from taking advantage of the breaches of covenant, by acceptance of rent and otherwise, after they had

notice of the breaches. After the amendments had been answered, the plaintiff renewed his motion, before the Lord Chancellor.

On the 13th of July, 1832, his lordship made the following order: that the judgment obtained by the defendant, in the action brought by him, against the plaintiff, for the recovering of the leasehold premises in the pleadings mentioned, ought to stand; but that the execution upon the said judgment should be stayed until the trial of the issues after directed shall be had, and the further order of this court: that the parties should proceed to a trial at law, in the Court of Common Pleas, on or before the sittings after Easter Term then next, on the following issues; viz. first, whether Adams, his executors, administrators or assigns, or any of them, had or not made default in the due observance and performance of any or either of the covenants contained in the lease of the 24th of October, 1810, on his and their part to be observed and performed: secondly, whether he or they, or any of them, had or not made default in the due observance and performance of any or either of such covenants and agreements, of which the lessor, his executors, administrators or assigns might have availed himself if the term had not expired; and, if either of the above issues should be found in the affirmative, then it was ordered that the parties should proceed to the trial of the third: whether the lessor, his executors, administrators or assigns, had done any act to disentitle himself, or themselves from taking advantage of such default: and the judge was to indorse any matter specially on the *postea;* and the defendants in this court were to be plaintiffs at law, and the plaintiff in this court was to be defendant at law.

The issues were tried before Lord Chief Justice Tindal, on the 7th of February, 1833, when verdicts were found, for the plaintiffs at law, upon each of them: and the bill was ultimately dismissed with costs.

Williams *v.* Parkinson.

5 *Simons*, 74.

A defendant, who was in contempt for not answering the bill, on being brought to the bar of the court, under 11 Geo. 4. and 1 Will. 4. c. 36, rule 6, deposed that she was unable, by reason of poverty, to employ a solicitor to put in her answer, upon which the usual reference was made to the Master. The defendant refused to make any statement to the Master, as to the subject of the reference. Upon which the court ordered proceedings to be taken under the second rule of the act, for taking the bill, *pro confesso*, against her.

December 15, 1831.

THE defendant had appeared to the bill, but refused to answer it; and she was committed to the Fleet for the contempt.

On the 23d of November, 1830, she was brought to the bar of the court, by writ of *alias pluries habeas corpus cum causis*, to answer her contempt for not putting in her answer to the bill; and, having been sworn and examined, pursuant to 11 Geo. 4. and 1 Will. 4. c. 36, s. 15, rule 6, she deposed that she was unable, by reason of her poverty, to

[Williams *v.* Parkinson.—5 Sim. 74.]

employ a solicitor to put in her answer: upon which it was ordered that it should be referred to the Master, to inquire and state whether the defendant was or was not unable, by reason of her poverty, to employ a solicitor to put in her answer to the bill; and, in the meantime, it was ordered that she should be remanded to the Fleet.

The Master certified that he had been attended by the solicitor for the plaintiffs, and had caused notice to be given, to the defendant, requiring her to bring in a statement as to her inability to employ a solicitor to put in her answer; but that the defendant had not brought in any statement, nor had any person appeared before him on her behalf; and that he was, therefore, unable to ascertain whether the defendant was, or was not unable, by reason of her poverty, to employ a solicitor to put in her answer.

A clerk to the plaintiff's solicitor made an affidavit that he had served the defendant with a copy of a warrant to proceed before the Master, and that, at the same time, he explained to her that it was required, by the Master, that she should cause to be filed in the Master's office, a statement, and evidence in support of it, of her inability to employ a solicitor in the cause; but that the defendant positively declared that she would not file any answer to the bill, or carry any state of facts into the Master's office. Mr. Orchard, a solicitor, also deposed that he had called, several times, on the defendant, in the Fleet prison, for the purpose of preparing a short statement of facts regarding her inability, by reason of poverty, to put in an answer, to enable the Master to report thereon; but that the defendant declined to carry any state of facts into the Master's office, or to put in her answer to the bill. The defendant still persisting in her contempt, on the 15th of December, 1831, the Vice-Chancellor ordered, on the motion of Mr. Cooper, supported by the above affidavits, that a writ of *habeas corpus cum causis*, should issue, directed to the warden of the Fleet, commanding him, at the return of the writ, to bring the defendant to the bar of the court, to answer her contempt; and the clerk in court for the plaintiffs was then to attend with the record of the bill, in order that the same might be decreed to be taken *pro confesso* against her.

His Honour, after pronouncing his order, observed that the conduct of the defendant, was an aggravation of her original contempt.

On the 22d of December, 1831, the defendant was brought to the bar of the court accordingly, and the record of the bill being read, and she still persisting in her contempt, and refusing to put in her answer, it was ordered that the bill should be taken *pro confesso* against her.*

Reg. Lib. B., 1831, fol. 594.

* It seems that the order of the 15th of December was made under the second rule of the act above referred to. When that order was applied for, it was doubted whether the second or the thirteenth rule applied to the case. See the next case.

Atkinson *v.* Flint.

5 *Simons*, 77.

A REFERENCE having been made, under 10 Geo. 4. and 1 Will. 4. c. 36, rule 6, neither the defendant nor any person on her behalf, appeared before the Master, though she had been personally summoned. The Master proceeded, *ex parte*, with the inquiry, and reported that the defendant did not appear to be unable, by reason of her poverty, to employ a solicitor to put in her answer. The court refused to order the bill to be taken *pro confesso*, but referred it back to the Master to review his report, and ordered the warden of the Fleet to produce the defendant before the Master at such time and place as the Master should appoint, and that the inquiry should be proceeded with in defendant's presence.

December 22, 1831.

Mackinnon *v.* Sewell.

5 *Simons*, 78.

Testatrix bequeathed her residue, in trust for her daughter Caroline for life, and after her death, for her grand-daughter if she should survive her mother, and attain twenty-one, but in case she should not survive her mother, and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death as they attained twenty-one, and if all such other children of the testatrix's said daughter *should die before attaining twenty-one*, then in trust for L. M. The grand-daughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive his mother; afterwards the daughter died: Held, that the bequest over to L. M. took effect.

December 16, 1831.

LYDIA VERNON, by her will, dated the 11th of July, 1782, disposed of her residuary personal estate in the following words: "and, as to the rest, residue and remainder of all my personal estate and effects whatsoever and wheresoever, I give, devise and bequeath the same unto Lord Hawke and John March, upon trust to lay out and invest the same in or upon such of the public funds, stocks, or government or real securities, as they shall think proper, the same to be taken in their joint names, and to be had and held by them, and the survivor of them, his executors and administrators, upon trust to receive, answer and pay the dividends, interest and income thereof, from time to time, as the same shall become due and payable, unto my daughter Caroline Dewar, for and during the term of her natural life, for her sole and separate use and benefit, and not to be subject to the control, debts or engagements of her present or any future husbands and husband, and her receipts, from time to time, shall

[Mackinnon *v.* Sewell.—5 Sim. 78.]

be the only sufficient discharges for the same notwithstanding her coverture, and, from and after her decease, upon trust, to assign, transfer and pay the principal thereof, with the dividends and interest then grown, unto my grand-daughter, Caroline Lydia Dewar, if she shall survive her said mother and live to attain the age of twenty-one years, and, in the meantime, after her said mother's decease, to pay and apply the dividends, interest and income thereof, for or towards her maintenance and education; and, in case the said Caroline Lydia Dewar shall not survive her said mother and live to attain the age of twenty-one years, then upon trust to assign, transfer and pay, all the said trust stocks and premises, to such other child or children of my said daughter Caroline Dewar, in such manner as she shall, by any writing under her hand, notwithstanding her coverture, nominate, direct or appoint; and, for want of such nomination, direction or appointment, then in trust to assign, transfer and pay, all the said trust stocks, securities and premises, to such other child or children of my said daughter, Caroline Dewar, *as shall be living at the time of her decease*, equally to be divided between them, share and share alike, if more than one, and, if but one, then the whole to such only child, and to be paid them respectively *after their said mother's decease, when and as they respectively shall have attained the age of twenty-one years*, and, in the meantime, after their said mother's decease, the income of their respective portions to be paid or applied for or towards their maintenance and education respectively; and in case of the death of any of them before such age, then the share or shares of such child or children so dying, shall go and be paid to the survivor or survivors of them, at such time as his, her or their original share or shares is or are made payable as aforesaid: and, *if all such other children of my said daughter, Caroline Dewar, shall happen to die before attainment of the said age of twenty-one years*, then in trust for, and I give the same to my daughter, Louisa Mackinnon, her executors, administrators and assigns." And the testatrix appointed Lord Hawke and John March executors of her will.

The testatrix died in August, 1789. After payment of her funeral and testamentary expenses, debts and legacies, there was left standing in her name 5600*l.* three per cent reduced annuities, the dividends whereof were paid by Lord Hawke, the surviving executor, to the testatrix's daughter, Caroline Dewar, during her life. Caroline Lydia Dewar did not survive her mother, Caroline Dewar, but died in April, 1800. In April, 1804, Caroline Dewar, in exercise of the power given to her by the will, appointed 1000*l.*, part of the 5600*l.* stock, to her son John Dewar. In December, 1812, John Dewar died, having previously attained the age of twenty-one years. Maria Dewar, his widow, took out letters of administration to his effects. In April, 1821, Caroline Dewar died. She had no other children than John Dewar, and Caroline Lydia Dewar. In June, 1824, Maria Dewar died, leaving the defendants Caroline Dewar and Henry Dewar, her only children by John Dewar. The testatrix's next of kin at her death, were her three daughters, Louisa Mackinnon, Caroline Dewar, and Elizabeth Dupont. Louisa Mackinnon died a widow in 1816, and the plaintiff, Daniel Mackinnon, the elder, took out administration to her effects. The defendants Caroline Dewar and Henry Dewar, as the only children of John Dewar, the surviving child of Caroline Dewar deceased, were entitled to the grant of administation of the effects of Caroline Dewar deceased, but had not obtained

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it. In April, 1822, Mrs. Dupont, in consideration of natural love and affection, assigned, to the defendant Daniel Mackinnon, the younger, (who was her great-nephew) all the distributive and other parts and shares, sums of money, estate and effects which she then was or might become entitled unto under the will, or as one of the next of kin, of Lydia Vernon. Mrs. Dupont died, without issue, in 1824.

The bill, which was filed by Daniel Mackinnon, the elder, as the personal representative of Louisa Mackinnon, against Sewell and Holmes, the representatives of Lord Hawke, Daniel Mackinnon, the younger, and Henry Dewar and Caroline Dewar, prayed that the true construction of the trusts contained in the will of Lydia Vernon, as to her residuary personal estate, might be declared, and that the rights and interests of the plaintiff, and of Daniel Mackinnon, the younger, Caroline Dewar and Henry Dewar (if any) to and in the clear residuary personal estate of Lydia Vernon, might be ascertained and declared, and that Sewell and Holmes might be decreed to transfer the residuary personal estate of Lydia Vernon, remaining unappointed by Caroline Dewar, to the plaintiff, or as the court should direct.

The facts above stated were found, by the Master, in pursuance of the decree made on the hearing of the cause, by which he was directed to inquire whether Caroline Lydia Dewar survived her mother Caroline Dewar, and when they died respectively, and whether Caroline Dewar ever and when, and to what extent, and in whose favour, executed the power of appointment given to her by the testatrix's will, and whether Caroline Dewar had any and what children or child besides Caroline Lydia Dewar, and whether such other children or child were or was living or dead, and, if dead, when they, he or she, died; and whether they, he or she, lived to attain the age of twenty-one years, and who were the next of kin of the testatrix living at her death, and whether any of them were dead, and who were their personal representatives.

The cause now came on to be heard for further directions.

Mr. Knight and Mr. Beames for the plaintiff:

It is a settled rule of construction, that, where a testator has made a bequest, which may fail in more than one event, and has made a limitation over of the property bequeathed, in words which do not take in all the events in which the prior gift may fail, those words include every case of failure. Jones *v.* Westcomb, 1 Eq. Ab. 245, pl. 10; Murray *v.* Jones, 2 Ves. & B. 313. The intention of the testatrix, in this case, was that, if at the death of Caroline Dewar none of that lady's children could take her residuary estate, it should go to Louisa Mackinnon, or, in other words, that, on the failing of the prior limitation and not on its failing in a particular mode, the limitation over should take effect. The consequence is that, as neither of Caroline Dewar's children survived her, Louisa Mackinnon is entitled to the residue. If any other construction is put on the language of the residuary bequest, the residue will be undisposed of: but the court never puts such a construction on the language of a will, as will create an intestacy, except where the words will not admit of any other construction.

Sir E. Sugden and Mr. Barber, for the defendant Daniel Mackinnon the younger:

The cases cited are totally different from this case. In Jones *v.* West-

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comb, the testator bequeathed a term for years to his wife for life, and, after her death, to the child she was then *enceinte* with, and if the child died before twenty-one, than he gave one-third of the term to his wife, and the other two-thirds to other persons. If happened that the wife was not *enceinte* at all; so that the object, on the failure of which the gift over was to take effect, was removed more than in the manner contemplated by the testator. The language of the bequest over, more than included the event that happened. This case is the reverse of Jones *v.* Westcomb. It was in a given event only that the testator intended Louisa Mackinnon to take. Can it be fairly collected, from any part of this will, that the testatrix meant, what she certainly has not expressed, namely, that if nobody could take under the previous gift, then the subsequent limitation should take effect? It has never been held, in any case, that, because there was no person capable of taking the property bequeathed, it should go to a person who was to take it under circumstances totally different from those that happened. If the construction which the plaintiff contends for is put upon this residuary bequest, the court will, in effect, strike out some of the words in which it is expressed, and introduce others; and the consequence will be that Louisa Mackinnon will take the fund on the happening of an event on which it is not given to her, and the children of John Dewar will be excluded from participating in it. The residue is given to Louisa Mackinnon, in case all the children of Caroline Dewar die before the attainment of twenty-one: but John Dewar, as well as Caroline Lydia Dewar, attained twenty-one; how then can Louisa Mackinnon be entitled to the fund?

Mr. Knight, in reply:

The testatrix's intention was that, if the previous bequest failed in either of the modes pointed out, then Louisa Mackinnon should take the residue. It could make no difference, to the testatrix, whether the prior gift failed in one mode or the other. If there had been one surviving child of Caroline Dewar, that child would have taken the residue, to the exclusion of the issue of the other children. If Caroline Lydia Dewar had died under twenty-one, leaving issue, they would not have taken; and, if all the children of Caroline Dewar had died under twenty-one, leaving issue, Mrs. Mackinnon would have taken the residue, and the issue would have been excluded. The prior bequest having failed, the substituted bequest to Louisa Mackinnon has taken effect.

Mr. Swanston and Mr. Ching appeared for the defendants, Henry Dewar and Caroline Dewar.

The Vice-Chancellor:—Upon merely reading the clause by which the testatrix disposes of her residuary estate, it is, I think, impossible to doubt what the testatrix meant; because, in the first instance, she gives, to her daughter, a life interest in the securities in which the residue is to be invested; and then, on the death of her daughter she directs the trustees to transfer the securities to her grand-daughter, Caroline Lydia Dewar, if she shall survive her mother, and live to attain the age of twenty-one years. So that the donee is to answer the description both of surviving the mother, and attaining twenty-one; and then, in case Caroline Lydia Dewar shall not survive her mother, and live to attain the age of twenty-one years, a different disposition is made of the fund. That disposition is made, in the first instance, in terms which, through

the medium of an appointment by the mother, might have had the effect of giving the property to any of her other children, generally, leaving the mother to exercise her own discretion, as to whether her other children should or not take absolutely in her lifetime, even although they were minors. But, if the power of appointment be not exercised, then the trustees are to assign the residuary fund: "to such other child or children of my said daughter Caroline Dewar as shall be living at the time of her decease, equally to be divided between them, share and share alike, if more than one, and, if but one, then the whole to such only child, and to be paid to them, respectively, after their said mother's decease, when and as they respectively shall have attained the age of twenty-one years, and, in the meantime, after their said mother's decease, the income of their respective portions to be paid or applied for or towards their maintenance and education respectively; and, if all such other children of my said daughter Caroline Dewar, shall happen to die before attainment of the said age of twenty-one years, then in trust for, and I give the same to my daughter Louisa Mackinnon." The question is whether the testatrix did not mean to make a bequest over in case none of the other children of her daughter Caroline Dewar survived their mother and attained twenty-one. In my opinion it is clear that she meant her residuary estate to go over, in the event of that contingency happening. Then the question is, whether I am not at liberty so to construe those words, which do not artificially express that condition, as the court construed the words in Jones *v.* Westcomb, and Murray *v.* Jones. And I certainly think that I am not doing more violence to the expressions used by the testatrix in this case, if I construe them so as to make Louisa Mackinnon take in the event that has happened, than was done to the language of Lady Bath's will, in the case of Murray *v.* Jones. The exact words used in the bequest in Jones *v.* Westcomb, are not stated in the report; but, taking their effect to be as it is there represented, the party, contemplating that there might be a child born, makes a gift over, in the event of the child dying under the age of twenty-one. The expression: "if the child shall die under twenty-one," is equivalent to the expression: "if the child shall not live to attain twenty-one." It points to the same event, although the words are not the same; and I cannot but think that the bequest over in this case, in the event of the children that may survive the mother not attaining the age of twenty-one, is but equivalent to a bequest over in the event of there being no child who shall survive the mother and attain twenty-one; and although, by putting that construction on the gift over, violence is done, to a certain extent, to the words of the will, yet more violence is not done to them than has been done in similar cases: and I have to add that the intention of the testatrix, as it is to be collected from the context of the will, appears to require that the language of the bequest over should receive the construction which I have put upon it: and I, therefore, think that Louisa Mackinnon is entitled to the residuary fund.

All parties must have their costs out of that fund.

Casamajor *v.* Strode.

5 *Simons*, 87.

THE general inclosure act, so far as it enacts that the commissioner's oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory.

An inclosure act directed allotments to be made to A. as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as rector, and for his right of common. Part of the waste had been used by the lord as a rabbit-warren, but no mention of it, as such, was made in the inclosure act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three other allotments as a full compensation for his rights above-mentioned: Held, that A.'s title to the allotment in respect of the warren could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil.

December 17, 1831; January 10, 1832.

Phillips *v.* Everard.

5 *Simons*, 102.

A. leased premises to B. for ten years; and B. covenanted *not to assign* the premises, without A.'s consent. A. agreed to grant to C. a lease for ten years, from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died, before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets), for a special performance of the agreement, and offered so to qualify the covenants of the lease, as that the executors should be no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease.

December 21, 1831.

BY an indenture dated the 19th of April, 1819, the plaintiff demised to Isaac Daulton, his executors and administrators, a dwelling-house, with the outbuildings, yards and gardens thereunto belonging and adjoining, situate in Spalding, in the county of Lincoln, and also two pieces of pasture land, containing five acres, for ten years, from the 6th of April, 1820, at the yearly rent of 280*l.*; and it was thereby agreed that it should not be lawful for Daulton* to part with the possession of the demised

* This proviso, as it was set forth in the bill, did not extend to Daulton's executors or administrators. See the Judgment of Ashhurst, J. in Roe *v.* Harrison, 2 T. R. 429.

premises, to any person, for all or any part of the term, without the consent of the plaintiff, his heirs or assigns, in writing, for that purpose, first had and obtained. Daulton, by virtue of the lease, took possession of the premises, and continued in possession of the same until the year 1825, when he entered into a treaty with Richard Everard to assign to him a certain part of the premises, for the residue of the term granted by the lease. The bill stated that, on the occasion of such treaty, Everard offered and agreed to pay, to Daulton, a rent of 55*l.* per annum, for the premises to which the treaty related, provided that Daulton could obtain the plaintiff's consent to the assignment thereof, and provided the plaintiff would consent to grant, to him, Everard, a further lease of the same premises, for seven or ten years at the same rent of 55*l.* per annum, on the expiration of the term granted to Daulton. The plaintiff consented to the proposed assignment, and, as the bill stated, agreed to grant, to Everard, a further lease, for ten years, of the premises proposed to be assigned to him, at the rent of 55*l.* per annum, *and subject to the same covenants as were contained in Daulton's lease.*

In order to show that Everard was bound to take the further lease upon the terms before-mentioned, the bill set forth several letters relating thereto, which had been written by Charles Bonner, as the solicitor, and by the desire (as the bill alleged) of Everard to the plaintiff, and the answers returned thereto, and which the bill contended, amounted to a binding agreement, between the plaintiff and Everard, for such further lease.

In July, 1825, Everard entered into possession of the premises agreed to be asssigned to him, and continued in possession of them until the 20th of November, 1829, when he died, having, by his will, appointed the defendants his executors; but he had not taken any lease from the plaintiff, in pursuance of the alleged agreement. After Everard's death, the plaintiff's solicitor informed the defendants, by letter, that the plaintiff was ready to grant, to them, a lease agreeably to their testator's contract, and *to permit the covenants, which were to be entered into on their parts, to be so qualified as that the defendants might be no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made, to him, in his lifetime*, and he had executed a counterpart thereof. The defendants, however, declined to accept any lease from the plaintiff: upon which the bill was filed, charging (amongst other things) that the plaintiff had made the before-mentioned offer to the defendants, and praying that the defendants might be decreed specifically to perform the agreement so made and entered into by the testator, and that they might be decreed to execute the counterpart of a proper lease of the premises, to be executed by the plaintiff for carrying the agreement into effect according to the true intent and meaning thereof.

The defendants, by their answer, said that they did not believe that the testator ever proposed or intended to bind himself to take the further lease mentioned in the bill, or ever entered into any agreement, or authorized Bonner to enter into any agreement on his behalf, with the plaintiff, to take such further lease, but that the testator only intended to secure to himself, and only authorize Bonner to treat, with the plaintiff, for securing to him the option of having such further lease, should he desire the same: they denied all knowledge of the letters stated to have been written by Bonner to the plaintiff; and added that, if Bonner ever

[Phillips *v.* Everard.—5 Sim. 102.]

wrote any such letters, he did not write them at the desire or with the approbation of the testator, or under his instructions, but had exceeded any instructions given to him by the testator: they admitted that they had proved the will, and had possessed assets of the testator more than sufficient to discharge all his debts, funeral and testamentary expenses, and also to pay all future accruing rent of the premises, during the term of ten years from Lady-day 1830 (on which day the original lease expired), in case the court should be of opinion that a lease, for that term, and at the rent before-mentioned, ought to be accepted by them: they submitted whether the alleged contract (if any such was ever entered into) could be then specifically performed by the defendants, so as to place them in the same situation as if the testator had himself accepted a lease of the premises, and expose them to no further or other liabilities, and whether, under the circumstances, the plaintiff ought not to be left to enforce the contract (if any) at law.

The plaintiff having entered into evidence to prove his case, the cause now came on to be heard; when two questions were raised; first, whether the letters constituted a binding agreement between the plaintiff and the testator; second, if they did, whether a specific performance of the agreement could be decreed against the defendants, they being the executors of the party with whom the agreement for the lease had been entered into.

Sir E. Sugden and Mr. Rolfe, for the plaintiff.

Mr. Knight and Mr. Garratt for the defendants, as to the second question, said that the original lease contained a covenant against assignment: that the further lease was to be subject to the same covenants as the original lease; but, if the defendants took the further lease, they, being executors, must assign it. Seers *v.* Hind, 1 Ves. jun. 294: that it was impossible so to frame the covenants of the further lease, as not to bind the executors in any other way than they would have been bound, if the lease had been made to the testator in the first instance: and that the Reddendum would amount to a covenant for payment of the rent, and would bind the defendants, though they should assign the lease.

Sir E. Sugden, in reply, said that Seers *v.* Hind did not decide the question: that in Denn *v.* Skeggs (cited in 2 T. R. 134, and 8 T. R. 59), the court were equally divided upon the point: Roe *v.* Galliers, 2 T. R. 133; Doe *v.* Carter, 8 T. R. 57; Roe *v.* Harrison, 2 T. K. 425,* in which last case, it was expressly decided that the executors or administrators of a lessee might be restricted, by covenant, from assigning a lease.

The Vice-Chancellor said that the agency of Bonner was established by the evidence, and that the letters identified the premises, and particularised the terms upon which the lease was to have been granted to the testator, and consequently that they constituted a binding agreement for the lease; and that, with respect to the form of the lease to be granted, by the plaintiff to the defendants, it must be referred to the Master to settle it.

Declare that the agreement contained in the several letters of the plaintiff, bearing date, &c., and in those of C. Bonner, in the pleadings men-

* The cases as to restraints on alienation, are collected in 1 Swanst. 481, note, to which add Wilkinson *v.* Wilkinson, Coop. C. C. 259, and 3 Swanst. 515; Cooper *v.* Wyatt, 5 Madd. 482; Stephens *v.* James, 4 Sim. 499.

tioned, bearing date, &c., ought to be specifically performed and carried into execution, and decree the same accordingly: and let it be referred to the Master of this court in rotation, to settle and approve of a proper lease of the estate and premises comprised in the said agreement, in case the parties differ about the same; and let the plaintiff execute the said lease, and the defendants Henry Everard and Robert Everard, the acting executors of Richard Everard deceased, the testator in the pleadings named, execute a counterpart thereof: and let the said Master tax the plaintiff his costs of this suit, up to this time; and let the said defendants, as such executors, pay, to the plaintiff, what shall be taxed for such costs: and any of the parties are to be at liberty to apply, &c.*

Lempriere *v.* Valpy.

5 Simons, 108.

A married woman having power to dispose of property, by her will, executed as required by the power, but not referring to it, gave to her husband all the property which she might die possessed of, or have in reversion or in expectation: Held, not to be an execution of the power.

January 13; February 18, 1832.

BY indentures of lease and release, dated the 14th and 15th of December, 1813, being the settlement made in contemplation of the marriage between the Rev. John Lempriere with Elizabeth Deane, after reciting that Elizabeth Deane was entitled to one-fourth, or some other share of 1200*l.* five per cent bank annuities, and 600*l.* bank stock, and the several bonuses thereon, expectant, respectively, upon the decease of Sarah Anne Deane, the mother of Elizabeth Deane, and to the moiety of 1000*l.* three per cent reduced bank annuities, expectant upon the decease of John Deane her father, and also to the remainder or reversion in fee of one-fourth part of a messuage and lands in Reading, to take effect, in possession, on the respective deceases of the persons therein named, and that she was also entitled, for her life, to the dividends arising from 2627*l.* 5*s.* 2*d.* four per cent consolidated bank annuities, standing in the names of the trustees therein named, and that she was also possessed of the sum of 500*l.*, secured, and then due to her, by the joint promissory note of her father and mother, and that Elizabeth Deane, under the wills of Sarah Spicer, Sarah Zenzau, and George Deane her grandfather, and the marriage settlement of her father and mother, was entitled to, or interested in contingent or other property, consisting of freehold estates in the parishes of Shinfield and Burghfield, and in Reading or elsewhere, and divers sums of money, stocks, funds, and other personalty, and that it had been agreed that the freehold hereditaments, and also the 500*l.* promissory note, and the principal and interest thereby secured, and the aforesaid moneys, stocks, funds and securities, belonging to the said Elizabeth Deane, and her right, title

* No further proceedings were had in the cause. The defendants executed a lease, not settled by the Master, and paid the costs of the suit.

[Lempriere *v.* Valpy.—5 Sim. 108.]

and interest therein, as well vested as contingent, and all other her personal estate and effects, should be conveyed and settled to the uses, and upon the trusts thereinafter limited, and that, in consideration of such marriage, and by way of further provision, the said J. Lempriere had agreed to settle and secure a net sum of 200*l.* a year, for the life or widowhood of Elizabeth Deane, in case she should survive him, and also to convey, assign and settle in manner thereinafter mentioned, any real or personal property that might, thereafter, be given, descend or devolve on her, and to enter into the covenants in that behalf thereinafter mentioned: Elizabeth Deane conveyed and assigned, to the defendants, Richard Valpy and William Andrews, their executors, administrators and assigns, her one-fourth part or share of the sums of 1200*l.* five per cent annuities, and 600*l.* bank stock, and the several bonuses thereon, expectant respectively on the decease of Sarah Anne Deane, and all the accumulations thereof, and also her moiety of the 1000*l.* three per cent reduced bank annuities, expectant on her father's decease, and all the dividends and interest which, thenceforth, during the life of Elizabeth Deane, should grow due in respect of the 2627*l.* 5*s.* 2*d.* four per cent bank annuities, and also the note for 500*l.*, and the principal and interest due thereon, and all other the moneys, or securities for money, and personal estate or property, which she was then possessed of, or interested in, or entitled unto, in possession, reversion, remainder or expectancy, or otherwise howsoever, (except her wearing apparel, jewels, trinkets, and other articles of her dress and ornaments of her person,) in trust, after the marriage, as to the dividends arising from the 2627*l.* 5*s.* 2*d.* stock, during the joint lives of J. Lempriere and Elizabeth Deane, for her separate use; and, if J. Lempriere should die in her lifetime, then to pay the same to her and her assigns, during her life; and, as to the 500*l.*, secured by the promissory note, and all interest due, and to grow due for the same, in trust for such persons and for such intents and purposes, as Elizabeth Deane, alone, and notwithstanding her coverture, by any deed or instrument in writing, with or without power of revocation and new appointment, or by her last will and testament in writing, or any codicil thereto, or any writing in the nature of her last will and testament, should direct and appoint; and, in default of such direction or appointment, in trust for Elizabeth Deane, her executors, administrators and assigns, for her separate use; and, as to the one-fourth share of the 1200*l.* bank annuities, 600*l.* bank stock, and the moiety of the 1000*l.* reduced annuities, and all other the trust premises thereby assigned, and the trusts whereof had not been declared, in trust that, when the same should become vested in the trustees, in possession, by virtue of the assignment thereinbefore contained, to sell the same, and invest the proceeds in the usual securities, and to stand possessed of the same upon trust to pay the interest and dividends thereof to J. Lempriere and his assigns, for his life, and, after his decease, in trust to pay the interest and dividends to Elizabeth Deane and her assigns (in case she should survive J. Lempriere) for her life, and, after the decease of the survivor, as to all the said trust-moneys and the interest and dividends thereof, in trust for such person or persons, and for such intents and purposes, and in such manner and form as Elizabeth Deane, alone, notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered, by her, in the presence of, and attested by two or more credible witnesses

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or by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of a will or codicil, to be signed and published, by her, in the presence of the like number of witnesses, should, from time to time, direct or appoint, and, in default of such direction or appointment, in trust for all and every the children and child of the marriage, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or be married under that age, to be equally divided between them, if more than one, but, in case there should be no such child of the marriage, then in trust for the next of kin of Elizabeth Deane, according to the statutes of distribution, and as if she had died unmarried, without issue and intestate. And Elizabeth Deane conveyed, to Valpy and Andrews and their heirs, her remainder or reversion in fee expectant on the decease of the survivor of the persons therein named, of and in one-fourth part of the messuage with the appurtenances, situate in Reading, and also all other lands and hereditaments wherein she, or any person in trust for her, had any estate of freehold or inheritance in possession, remainder or expectancy in the county of Berks, or elsewhere within the United Kingdom, to hold the same to the use, after the marriage, of John Lempriere, for life, and, afterwards, to the use of such person or persons, and for such estate and estates, interest and interests, ends, intents and purposes, and with, under and subject to such powers, provisoes, declarations and agreements as Elizabeth Deane, alone, and notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered, by her, in the presence of two or more credible witnesses, or, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of a will or codicil, to be signed and published, by her, in the presence of three or more credible witnesses, should direct or appoint; and, in default of such direction or appointment, to the use of Elizabeth Deane, her heirs and assigns for ever. And the indenture of release contained a covenant by John Lempriere, and declaration by Elizabeth Deane, that in case, at any time during the coverture, any real, personal, or mixed estates or effects, should come to, or vest in Elizabeth Deane or John Lempriere, in her right, the same should be conveyed and assigned, by them, to Valpy and Andrews, as to such as should be real estate, to the same uses as were thereinbefore declared concerning the real estate of Elizabeth Deane, and, as to such as should be personal estate, upon the same trusts as were thereinbefore declared concerning the 1200*l.* bank annuities and 600*l.* bank stock, and 1000*l.* reduced annuities.

The marriage was celebrated on the 18th of December, 1813. Shortly afterwards Mrs. Lempriere's father died; and, thereupon, her share of the 1000*l.* reduced annuities was transferred to the trustees of the settlement. In February, 1818, Mrs. Lempriere's mother died, and, in August following, her share of the 1200*l.* bank annuities was transferred to the same trustees. In the same month, the trustees of the will of Sarah Spicer transferred, to the trustees of the settlement, Mrs. Lempriere's share of a sum of 2000*l.* three per cent reduced annuities, which had been given in trust for her mother for life, and, afterwards, for such of her children as should survive her.

Sarah Bostock, who died in 1820, bequeathed a legacy of 500*l.* to the trustees of the settlement, upon the trusts thereof, and in May, 1825, that legacy was paid to them, and they laid it out in the purchase of

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619*l.* 3*s.* 8*d.* three per cent consols, in their names. The other sums of stock so transferred to the trustees, were afterwards sold out by them, and the produce was invested in the purchase, in their names, of 991*l.* 10*s.* 1*d.* navy five per cents, and that sum was afterwards converted into 1041*l.* 1*s.* 7*d.* new four per cents.

In April, 1821, Mrs. Lempriere died, having made her will, dated the 4th of August, 1818, in the words following: "I, Elizabeth Lempriere, of Exeter, in the county of Devon, give and bequeath to my dear husband, the Rev. Dr. Lempriere, *all the property of which I may die possessed, or have in reversion or in expectation:* and I appoint my said husband sole executor of this my last will." The attestation clause to the will was as follows: "signed and delivered in the presence of W. H. Veale, W. V. Hennah, J. W. T. Fell."

Mrs. Lempriere left two children only, the infant defendants Anne Lempriere and Charles Lempriere. Dr. Lempriere proved his late wife's will, and shortly after her death he applied to the trustees of the settlement for a transfer of the trust property; but the trustees declined to transfer it to him without the sanction of the Court of Chancery, and Dr. Lempriere died before he had commenced proceedings to compel the trustees to make the transfer. By his will, dated the 19th of May, 1821, duly executed and attested, he gave, devised and bequeathed all his freehold lands and hereditaments, and all his personal estate and effects, to James Parkin, and to the plaintiff William Bury Moore, and to his son, the plaintiff, Edward Lempriere, upon certain trusts for the benefit of his children, and appointed Edward Lempriere and William Bury Moore executors of his will. The testator died on the 1st of February, 1824, leaving seven children, by a former marriage, (who were plaintiffs in the cause) and the defendants, Anne Lempriere and Chas. Lempriere his only children by his marriage with Eliz. Lempriere, living at his death.

The bill charged that Mrs. Lempriere's will operated as a due execution of the power of appointment given to her by the settlement, and that the trust property was duly bequeathed and appointed to her husband, and passed, by his will, to his executors, and that, therefore, the plaintiffs, Edward Lempriere and William Bury Moore were entitled to have the trust property transferred to them, for the purposes of his will; but that the defendants, Anne Lempriere and Charles Lempriere, claimed, as the only children of Elizabeth Lempriere, to be entitled thereto as in default of appointment by her.

The bill prayed that Mrs. Lempriere's will might be established and declared to be a due execution of the power of appointment of the trust property, given to her by the settlement, and that the defendants, Valpy and Andrews, might be ordered to transfer the 1041*l.* 1*s.* 7*d.* new four per cents, and 619*l.* 3*s.* 8*d.* consols, to the plaintiffs, Edward Lempriere and William Bury Moore, as the executors of Dr. Lempriere, and to pay to them the dividends accrued thereon since Mrs. Lempriere's death, and also to pay to them all such other moneys as might be then, or might thereafter come into their hands, in respect of the trusts of the settlement.

Two of the witnesses to Mrs. Lempriere's will were examined for the plaintiffs. They deposed that she, in their presence, and in the presence of the other witnesses (who they had been informed and believed had since died in Bengal), signed the paper writing purporting to be her will,

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and declared the same to be her will, and that the names of the witnesses were of their respective proper handwritings, and that they subscribed their names in the testatrix's presence and in the presence of each other. The witnesses, on their cross-examination, said that the testatrix signed the paper writing, and *said* that it was her will, in their presence: and one of them added that he did not recollect whether she said that she *published* it as her will.

Sir E. Sugden and Mr. Whitmarsh, for the plaintiffs:

The question is whether Mrs. Lempriere's will is a due execution of the power reserved to her, by the settlement, over the funded property: no question arises as to the real estates. Where a married woman makes a will (which she has no capacity of doing except in execution of a power expressly given to her), it is a strong circumstance to show that she intended to exercise that power. Where a person having a capacity to dispose of property, as well as a power over it, makes a disposition of that property, and it is equivocal whether he intended it to take effect, under the power, or by virtue of his capacity, the courts hold that it is not an execution of the power. But a married woman has no capacity to give, except by force of her power, and, if she executes an instrument, it can have no operation except under the power; and, therefore, the court will not deny to it that operation, which alone can give it effect.

This case does not fall within Lovell *v.* Knight, 3 Sim. 275.* In that case, which came before your Honour on further directions, the testatrix gave and bequeathed the whole of her property, both *real* and personal. It appeared, however, by the Master's report, that she had no real property, but only terms for years. The judgment seems to turn upon that point, and to treat the will as if it had been made by a person who was *sui juris*. The argument founded on the disability of the lady to make a will, except under the power, was not adverted to. Here the testatrix gives all the property which she might die possessed of, or have in reversion or in expectation. She had property subject to the power of every one of those descriptions: and she had no property in possession, in reversion, or in expectation, which was not subject to the power.

The power over the 500*l.* secured by the promissory note, was to be exercised simply by a will, or any writing in nature of a will: as to the funded property, the power was to be exercised by a will signed and *published* by the testatrix in the presence of two or more credible witnesses; but the witnesses were not required to attest the signing and publication. The attestation clause expresses that the will was signed and *delivered* by the testatrix in the presence of the witnesses. It appears, however, by the evidence, that the will was duly executed according to the power; and, besides, the delivery of a will has been decided to be equivalent to publication. Trimmer *v.* Jackson, 4 Burn's Eccl. Law, 130; Simeon *v.* Simeon, 4 Sim. 555.

Mr. Pepys and Mr. Torriano, for the infant defendants, Anne Lempriere and Charles Lempriere:

The decision in Lovell *v.* Knight was affirmed on appeal, and it is now the law of the court.

[The Vice-Chancellor:—In that case, it appeared, by the Master's

* The judgment was affirmed by the Lord Chancellor in December, 1831.

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report, that the married woman had other property than that which was comprised in the settlement. She was entitled to 112*l.*, arising from savings, in the hands of the trustees of the settlement.]

The decision did not turn upon there being that sum of 112*l.*, and the terms of the will were not referrible to it. The judgment in that case was founded on the general principle, which is that an instrument shall not be held to be an exercise of a power, unless it clearly refers to the power, or to the property which is the subject of it. The terms used by Mrs. Lempriere are quite as general as those used by the testatrix, in Lovell *v.* Knight: and there is nothing, either in the expressions in the will, or in the nature of the property, which can distinguish the one case from the other.

The witnesses have stated what was done and said by the testatrix, in their presence. It is not clear, from their evidence, that the will was published: the attestation clauses expresses it to have been signed and delivered; and one of the witnesses says that he does not recollect whether any thing was said about publication.

Mr. Knight and Mr. James Russell appeared for the defendants, Valpy and Andrews, the trustees of the settlement.

February 18th:—The Vice-Chancellor, after stating the trusts of the settlement, and the covenant for settling the real and personal property which might thereafter vest in Mrs. Lempriere, or in her husband in her right, continued as follows:

It does not, however, appear that there was any such subsequent real or personal estate.

There were two children of the marriage. Mrs. Lempriere died in the lifetime of her husband, having made a testamentary instrument in these words: "I, Elizabeth Lempriere, of Exeter, in the county of Devon, give and bequeath, &c."

The attestation clause to this will was as follows: " signed and delivered in the presence of, &c."

This instrument was duly proved by Dr. Lempriere.

It was said that there was no question as to the real estate, and none was raised at the bar. The only question was as to the funded property, and, with respect to that, it was said: 1st, that the will could not be objected to as an insufficient execution of the power, by reason that the witnesses attested its signing and delivery only, and not its publication: and, secondly, that, taking the will to be duly signed and published, it operated as an appointment of the property in question.

Upon the first point it is observable that the terms of the power did not require the witnesses to make any written attestation at all. The case is, therefore, free from the objection that was made in Moodie *v.* Reid, 7 Taunt. 355, and 1 Madd. 516, and the cases there referred to, where the witnesses did not sign an attestation, in writing, of the signing and publishing, which were required to be attested. But, even admitting those cases to be law, it appeared, by the evidence in this cause, as well as by the written attestation, that the will was produced and delivered by Mrs. Lempriere. In Moodie *v.* Reid, Lord Chief Justice Gibbs says: "if the act of the testatrix, in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also; because they attest that by which she publishes it." His

lordship also says: "I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." And, consistently with what the lord chief justice is reported to have said, my opinion is that the will, in this case, by having been first signed, and then delivered, to the witnesses, by Mrs. Lempriere, in order that they might attest it, has been duly signed and published by her within the terms of the power.

Upon the second point, it was forcibly urged that, where a person has a power, but no capacity to give, except by force of the power, an instrument professing to give, can only operate as an execution of the power, and, therefore, must be an execution of the power, if duly executed within the terms of the power; and it was said that this observation is especially applicable to the case of a feme covert, who has no inherent power in herself to make a will. It appears to me that these observations cannot affect the present case; because, though a married woman, in some sense, has no capacity to give, yet, under certain circumstances, she may give, with the consent of her husband, and even against his consent. If she has in herself a representative character, by being the executrix of a party deceased, by making a will and appointing her husband, or any other person her executor, she may, provided her husband consents that her will shall be proved, transmit, to him or her other nominee, her own representative character; and many cases may be put, in which it will be more beneficial, for her husband or other persons connected with her, that the representation by executorship should be continued, than that it should be destroyed. She may have property settled, simply, to her separate use; and her will making a general disposition of her property, would pass what is so settled. In this very case, the settlement which gives rise to the question before the court, shows that Mrs. Lempriere had property, namely, the 500*l.*, settled, simply to her separate use, which would pass by a general gift made by will. It cannot, therefore, be assumed, on principle, that the will of a feme covert is, of necessity, altogether inoperative as a will. And no case has been quoted, nor, at the hearing, did I recollect any, nor have I since been able to find any, in which it has been held that the will of a feme covert, professing to give all her property, in general terms, must be taken to be an execution of mere powers, which she may possess. If any such case had existed, the counsel for the plaintiff, whose able treatise on the doctrine of powers is so well known to the profession, would have named it.

The will of Mrs. Lempriere seems to me to be nothing more than a general gift of her property, not referring to the power which she had, or the subject of the power, and, therefore, according to the known rule, as laid down in Standen *v.* Standen, 2 Ves. jun. 589; Standen *v.* M'Nab, 6 Bro. P. C. 193, 2d edit.; Bennet *v.* Aburrow, 8 Ves. 609; Jones *v.* Tucker, 2 Mer. 533; Jones *v.* Curry, 1 Swanst. 66, not an execution of her power.

This is my opinion of the case, independently of the decision in Lovell *v.* Knight. The original decision upon that case, I should have considered as of little weight; but, as it has been affirmed by the Lord Chancellor, I am not now at liberty to depart from it, and it seems to me to govern the present case. I, therefore, decide that Mrs. Lempriere's will was not an execution of her power over the shares of the bank annuities.

Pickford *v.* Hunter.

5 *Simons*, 122.

To a creditor's bill, the defendants pleaded a decree obtained by other creditors in a prior suit.

Plea overruled: the decree being less beneficial to the plaintiffs than they might obtain in their own suit.

November 24, 1831.

THE bill, which was filed on the 18th of June, 1831, against William Hunter, William Watkin, and Rebecca Nicks, an infant, stated that, previous to 1826, the plaintiffs carried on, and did still carry on, the business of common carriers, in co-partnership together, in London; that, in the course of their business, they had large dealings at Leamington, in the county of Warwick; that, in 1825, they agreed with Richard Nicks that he should act as their agent, in managing their concerns at that place, and that he should be responsible to them for all freights and carriages of goods coming to his hands, as their agent, and chargeable at Leamington; and that the plaintiffs should pay to him a commission of five per cent upon the amount of all such freights and carriages: that Nicks received various sums of money, from different persons, on the plaintiffs' account, but he had not accounted to them for such moneys since the 31st of December, 1829, and that, at his death, he was indebted to them, on account of such moneys, after deducting his commission, in the sum of 258*l.* 14*s.* 6*d.*: that he was also, at his death, indebted, as it was alleged, to several other persons, and that he was, at the time of making his will and codicil after mentioned, and at his death, seised in fee of divers real estates, and that he was, at his death, possessed of considerable personal estate; and that he made his will, dated the 27th of March, 1830, and executed and attested so as to pass freehold estates, and thereby, after giving a small annuity as therein mentioned, he gave the residue of his estate and effects, real and personal, to his daughter, the defendant, Rebecca Nicks, her heirs and assigns, and appointed the defendant, William Hunter, sole executor of his will and guardian of his said daughter; that the testator made a codicil to his will, dated the 28th of March, 1830, and which was also executed and attested so as to pass freehold estates, and he thereby appointed the defendant, William Watkin, to be an executor of his will, jointly with Hunter, and empowered them to sell his real estate, and to convey the same to the purchaser or purchasers thereof, and the moneys arising from such sale to be disposed of as his personal estate: that the testator died on the 28th of March, 1830, leaving the defendant, Rebecca Nicks, his only child and heiress at law, and that Hunter and Watkin duly proved the will and codicil on the 7th of October, 1830: that, upon the death of the testator, Hunter and Watkin entered into possession or receipt of the rents and profits of the testator's real and leasehold estates, and had ever since continued in such possession or receipt, and had possessed all the testator's personal estate: that Nicks carried on, at his death, the trades or businesses of a carpenter and builder and timber-merchant and wharfinger, and was, as carrying on such trades

or businesses, at his death, a trader, liable to the operation of the bankrupt laws. The bill charged that the defendants, the executors, had not only not used due diligence in administering the testator's assets, but that, in fact, with a view of delaying the payment of the testator's debts, and of having a pretence for delaying such payment, a common creditor's bill had been filed, on the 17th of December, 1830, by Matthew Chinn and William Langham and William Francis Patterson, as creditors upon the testator's assets, and that such bill was filed against the defendants, Watkin, Hunter, and Rebecca Nicks: that the plaintiffs in the present suit had ascertained that Patterson was the solicitor who instituted the former suit, and that no answer had been put in by any of the defendants to that suit; but that appearances had been entered, for all of the defendants thereto, by Patterson, as their solicitor, and that that suit was, altogether, a friendly suit, and had been instituted with a view of preventing any other creditor of the testator from instituting a suit, and with the intention, in case any other creditors should institute a suit, of proceeding, in the suit so instituted by Patterson as aforesaid, to obtain a decree as speedily as possible, in order that the defendants, Watkin and Hunter, might keep the disposal of the testator's assets under their own control: that Chinn (who was a bricklayer) was interested with the testator in various portions of his leasehold estates, and was desirous of obtaining the testator's share therein; and that Patterson was the solicitor of the testator in his lifetime, and that, since the testator's death, he had been and was then the solicitor of the testator's executors: that Hunter, who principally acted as executor under the will and codicil, claimed to have an interest in the testator's freehold and leasehold estates, by reason, as he alleged, of some charge or incumbrance for 800*l.*, executed to him by the testator: that the testator was not, at his death, indebted to Hunter, in any sum of money whatever; and that, if he was so indebted, the same was merely a simple-contract debt. The bill prayed that an account might be taken of what was due to the plaintiffs, on the account thereinbefore mentioned, and also of the testator's personal estate, and also of his debts, funeral and testamentary expenses; and that the personal estate might be applied in payment of the debts due to the plaintiffs, and the other creditors of the testator, in a due course of administration; and in case the personal estate should not be sufficient for the payment of all his debts, then that the deficiency might be made good by sale or mortgage of his real estates, and that the proper or necessary sales or mortgages might be directed accordingly; and that, in the meantime, a receiver might be appointed of the rents of the testator's freehold estate.

To this bill the defendants, Hunter and Watkin, put in a plea, alleging that long before the plaintiffs filed their bill, to wit, on the 17th of Dec. 1830, a bill of complaint was exhibited, in the Court of Chancery, by Matthew Chinn, William Langham and William Francis Patterson, on behalf of themselves and all other the creditors of the testator, against the defendants Watkin and Hunter and Rebecca Nicks, thereby, amongst other things, stating the will and codicil, and the death of the testator, leaving Rebecca Nicks his only child and heiress at law, and that Watkin and Hunter had duly proved the will and codicil: and also stating that the testator was indebted to the plaintiffs in that suit, and to divers other persons, at the time of his decease, and that he was a trader within the operation of the bankrupt laws, and praying that an account might be taken of what was due to the said plaintiffs in that suit, and the other

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creditors of the testator, and that an account might also be taken of the testator's personal estate received by Watkin and Hunter, or by their order, or for their use, and that such personal estate might be administered under the direction of the court, and, if necessary, that the testator's real estate, or a competent part thereof, might be sold, and that all proper parties might be decreed to join in such sale, and that, out of the testator's personal estate and effects, and the moneys to arise from the sale of his real estate, the plaintiffs in that suit and all other the creditors of the testator, might be paid their several demands, in a due course of administration, and that all necessary accounts might be taken of the testator's real estates and that a receiver might be appointed of the rents of the real estates and of the outstanding personal estate of the testator, and that all necessary directions might be given for effectuating the purposes aforesaid. The plea further alleged that Watkin and Hunter and Rebecca Nicks appeared to the bill, and put in their answers thereto, and that the cause came on to be heard, before the Master of the Rolls, on the 30th of July, 1831, when it was referred to the Master in rotation to take an account of what was due to the plaintiffs in that suit, and all other the creditors of the testator, and of his funeral expenses, and to compute interest on such of his debts as carried interest, after the usual rate; and the Master was to cause advertisements to be published in the usual manner for the creditors of the testator to come in and prove their debts: and it was ordered that the Master should take an account of the testator's personal estate come to the hands of his executors, or of any other person, &c., and that the testator's personal estate should be applied in payment of his debts and funeral and testamentary expenses in a course of administration, and that Watkin and Hunter should be at liberty, with the approbation of the said Master, to compromise or compound any debts due to the testator's estate, and that the plaintiffs in that suit should be at liberty to exhibit an interrogatory or interrogatories, in the examiner's office, and examine witnesses thereon, to prove the due execution of the will of the testator, and that the testator was at his death a trader within the true intent and meaning of the statute made in the forty-seventh year of the reign of his late Majesty King George the Third, intituled, "an act for more effectually securing the payment of the debts of traders:" and, for the better taking the said accounts, the parties were to produce before the Master upon oath all books, &c., and were to be examined upon interrogatories, &c. And the consideration of all further directions and the costs of that suit were reserved until the Master should have made his report: and any of the parties were to be at liberty to apply, &c. The plea further alleged that the said decree was regularly passed and entered, and that the same had been carried into the Master's office, and that the necessary proceedings were to be immediately had in the said office: and that the said decree was still in force, and had not been impeached or set aside or complained of or appealed from. And the defendants averred that the rights and claims of the plaintiffs in that suit of and in the testator's estates and effects, and the rights and interests of the plaintiffs in this suit, of and in the same estates and effects, were the same: and they pleaded the decree in bar to the bill.

Mr. Knight and Mr. Lynch for the defendants, Watkin and Hunter, in support of the plea, said that it was a plea of a decree in a creditor's suit, to a bill by other creditors, which prayed nothing more than was prayed

by the bill in the prior suit: that, if that suit was improperly conducted, the plaintiffs in this suit, ought to have moved to have the conduct of it: that, when a decree had been obtained in a creditor's suit, the court would not allow any other suit, of the same nature, to proceed; and that it made no difference in that respect, that the decree pleaded had been obtained, subsequent to the filing of the bill in the second cause.

Sir E. Sugden and Mr. Purvis, for the plaintiffs, Pickford & Co., in support of the bill, said that the course which the defendants ought to have taken, was, not to plead the decree, but to move to stay the proceedings in the second cause; for that, after a decree in a creditor's suit, the court would stay proceedings, by other creditors, both at law and in equity, 8 Ves. 520: that there were other grounds on which the plea ought to be overruled, for the plaintiffs in the first suit had not proved the will, at the hearing of the cause, or that the testator was a trader, and consequently that their suit did not entitle them to affect his real estates; so that they had not obtained so beneficial a decree as the plaintiffs in this suit were entitled to: that the office of a plea in bar, was to get rid of the plaintiff's demand: that the plaintiffs in this cause, had not gone in under the decree and proved their debt: and that the plea did not aver that the parties and interests were the same in both suits, but that the plaintiffs in the other suit, had the same rights and interests as the plaintiffs in this suit. Lechmere *v.* Brasier, 2 Jac. & Walk. 287; Neve *v.* Weston, 3 Atk. 557; Law *v.* Rigby, 4 Bro. C. C. 60.

Mr. Knight, in reply, observed that, in Lechmere *v.* Brasier, the court had directed the intestate's real estates to be sold, before it had been proved that he was a trader; which was clearly irregular; and that, though an order to stay the proceedings in this suit, might have been obtained upon motion, the defendants were not compelled to adopt that course, but were at liberty to plead the decree in bar to the second suit.

The Vice-Chancellor:—The decree, as it is pleaded, is not so beneficial, to the creditors, as that which the plaintiffs in this suit may obtain. It is not represented that any debt has been proved in the suit which has been instituted by Mr. Patterson, or that there is, in that suit, any proof of the execution of the will and codicil, or of the testator being a trader at his death. The consequence is that the decree which has been obtained in that suit, is a decree which affects the personal estate only of the testator: and, moreover, as no debt appears to have been proved, in that suit, the decree is manifestly erroneous. The decree in the former cause, ought to be as beneficial to the plaintiffs, as that which they may obtain in their own suit: but the decree which has been pleaded, is, at all events, one degree further from final decision than that which the plaintiffs in this suit may obtain.

The averment, in the plea, that the rights and interests of the plaintiffs in both suits, are the same, is not true; for the right of A. to be paid his debt, is not the same as the right of B. to be paid his debt.

Plea overruled.

Newton *v.* The Earl of Egmont.

5 Simons, 130.

Where estates have been conveyed to trustees, in trust for such of the creditors of the grantor as should execute the conveyance, and a bill is filed, by an incumbrancer (some of whose securities are prior, and others subsequent, to the trust-deed) praying that his rights and interests under his securities may be established, and the priorities of himself and the other incumbrancers declared, all the creditors who have executed the conveyance, however numerous they may be, must be made parties to the suit.

January 13, 1832.

IN pursuance of the permission to amend the bill, granted on the demurrer *ore tenus* in this cause, being allowed,* the plaintiff added William Forsyth, as a defendant to the bill, and introduced the following allegation into it: "that the said indenture of release† was executed by thirty‡ creditors of the said John Earl of Egmont, as parties thereto of the second part, and, among others, by John Wain and William Forsyth, defendants hereto, and such creditors are too numerous to be all made parties to this suit, and no person has executed such indenture as a party thereto of the third part, and there is not any such party; and your orator is ignorant of the priorities and interests of the said parties thereto of the second part, and of the nature and amount thereof, and is ignorant of their residences, and whether they are living or dead, save as to the two last named defendants, and save that none of the said parties of the second part was an incumbrancer, except as a judgment creditor, and your orator is altogether ignorant, save as aforesaid, who are the persons interested under, or entitled to the benefit of the trusts of indenture, or in any manner interested in the said property."

The defendant, John Godfrey Teed, put in a plea to the whole of the amended bill, which, after setting forth the prayer of that bill, alleged that, by indentures of lease and release, bearing date, respectively, the 1st and 2d days of November, 1824, (being the indentures of those dates in the bill mentioned) the release being made between the said John Earl of Egmont, of the first part, the several persons whose names, &c., certain manors and other hereditaments in the county of Somerset, and including, amongst others, the estates comprised in the said complainant's alleged securities, and in respect whereof he seeks to obtain the relief prayed by his bill, were duly conveyed and assigned, by the said John Earl of Egmont and Viscount Perceval, unto and to the use of the said Viscount Perceval, this defendant, and the said Edward Tierney, their heirs and assigns, upon certain trusts therein expressed for the benefit, amongst other things, of the several creditors of the said John Earl of Egmont whose names should be set down in the

* See 4 Sim. 585.

† The release of 2d Nov. 1824.

‡ By the plea it appeared that the number of persons who had executed the release, as parties of the second part, but who were not parties to the suit, was twenty-six.

said second schedule thereto annexed, and who, by themselves, or their agents or attorneys, should execute the said indenture of release, and thereby become parties thereto of the second part, and for providing for the payment of the debts of such several creditors by means of the said estates and the trust funds to arise therefrom, and the rents, profits and produce thereof; and it was, by the said indenture, agreed and declared, and the said John Earl of Egmont did thereby direct that it should be lawful for the said trustees or trustee for the time being, to sign, issue and deliver, to all and every the creditor of the said Earl whose debts should be so respectively allowed, settled or compromised for as therein mentioned, any assignable debentures, or certificates of acknowledgment of or for the amount of the several and respective debts so allowed, settled or compromised, such debentures to represent the debt or respective debts, sum or sums of money for which they should be signed and issued as aforesaid, and to be made payable to the creditors or persons entitled to such debts or sums of money, their executors, administrators and assigns, out of the respective trust funds thereby provided and established for the payment thereof, so that every creditor or other person accepting such debenture, should enter into an engagement not to sue or molest the said Earl or the said Viscount Perceval as his surety, (if he should be such surety,) according to the form of, or in substance or effect similar to the debenture or engagement set forth in the schedule thereunder written, or as near thereto as the circumstances of each case might require, a counterpart of which debenture and engagement should be signed by such creditors: and it was further declared and provided that creditors by judgment, and persons having charges and liens upon the said manors and hereditaments, who should sign and execute the said indenture, should accept and receive such debentures, and sign such engagements as aforesaid, in lieu and by way of substitution for the securities held by them respectively, and, in respect of which and the moneys thereby secured, they should respectively sign and execute the said indenture, but nevertheless, each such debenture should, with reference to the other debentures thereby authorized to be given, or to any other claims, have such priority, in point of payment and security as the original security or securities in lieu of which the same should be substituted, and, with reference to the other general securities, would have had or been entitled to, in case all the same securities, had been subsisting, and had not been paid according to their priorities. The plea then alleged that Sir Edward Kerrison, of Oxne Hall, in the county of Suffolk, Bart., Richard Denney, of Bergh Apton, in the county of Norfolk, Esq., William Lord Bishop of Sodor and Man and twenty-three other persons (whose names, places of residence and additions were mentioned, except William Mills Pulley, whose residence and addition were omitted) were, together with the defendants Wain and Forsyth, the several persons whose names were set down in the first schedule to the release of the 2d of November, 1824, and, who by themselves or their agents or attorneys, had all executed that deed, and had, thereby, become parties thereto of the second part, and that debentures had been signed, issued and delivered to all such persons by the defendants Viscount Perceval, J. G. Teed, and Edward Tierney, pursuant to the provisions of the release, for the amounts of their respective debts, which had been allowed, settled and compromised as mentioned therein. The plea further alleged that all the twenty-six persons before mentioned, as creditors entitled to the benefit of the inden-

[Newton *v.* The Earl of Egmont.—5 Sim. 130.]

tures of November, 1824, were, or claimed to be, interested in the taking of the accounts prayed by the bill, and in contesting the priority which it sought to establish in favour of the plaintiff's securities, but, nevertheless, they were not made parties to the bill.

Sir E. Sugden and Mr. Girdlestone, jun., for the defendant, J. G. Teed, in support of the plea, contended that all the persons who were parties to the release, of the second part, were necessary parties to the suit. Their arguments were substantially the same as were offered on that point, on the hearing of the demurrer *ore tenus*.

Mr. Knight and Mr. Spence, for the plaintiff:

It is laid down, by Lord Eldon, C., in Adair *v.* The New River Company, 11 Ves. 429. 443, *et seq.*, that, where the parties interested in the subject of a suit are so numerous that it would be impracticable, or even inconvenient to make them all parties, it is not necessary, for the purpose of obtaining a degree, to bring them all before the court. The same doctrine is laid down in Cockburn *v.* Thompson, 16 Ves. 321. No decree would be made in this suit, which would affect any of the creditors who are not parties to it. Advertisements would be directed to be published, and every creditor would go in under the decree, and establish his claim, in the Master's office; so that the rights of none of the creditors would be decided upon, in their absence. The persons who are parties to the release of November, 1824, of the second part, are judgment creditors merely: that deed has not been executed by any of the persons who were parties to it of the third part. The places mentioned in the plea, as the residences of the parties of the second part (who are stated to be thirty in number) may have been their residences at the time when the deed was executed, but may have ceased to be so now; and, as to one or two of those parties, no place of residence is mentioned. The plea ought to have set forth the places where the parties resided at the time when it was filed.

The plea contains no averment that the debentures continue in the hands of the persons to whom they were originally given. It is not sufficient to aver that a party was interested, at a particular time, and that he now claims to be interested in the subject matter of the suit; nor is there any allegation in the plea that the persons named are all the persons who have executed the release as parties of the second part.

This plea does not give any information as to the priorities of the several creditors. It states the trusts of the release in a vague and general manner, and brings forward no new fact whatever: and pleas have been frequently overruled on that ground. Billing *v.* Flight, 1 Madd. 230; Steff *v.* Andrews, 2 Madd. 6.

The Vice-Chancellor:—The bill sets forth the decree in Mr. Wain's suit; and it represents that the plaintiff, Mr. Newton, was desirous of going in before the Master, under the decree in that suit; but that some of the parties refused to allow him to have the benefit of that decree. Then he files his bill praying to have his priority ascertained. The bill alleges that the release was executed by thirty creditors of Lord Egmont, as parties thereto of the second part, and, amongst them, by the defendants Wain and Forsyth, and that such creditors are too numerous to be all made parties to the suit, and that the plaintiff is ignorant of the priorities and interests of the parties to the release of the second part, and of

their residences, and whether they are living or dead, save as to the two last-named defendants, and that the plaintiff is altogether ignorant, save as foresaid, who are the persons entitled to the benefit of the trusts of the release. This allegation was introduced into the bill, after the demurrer *ore tenus* for want of parties, had been allowed. So that, *prima facie*, the plaintiff, by his amendment, admits that those persons ought to have been made parties, unless a sufficient reason is assigned for not making them parties. To this bill Mr. Teed has put in a plea, which obviates the reason, by giving the names and residences of twenty-six parties, with the exception of two, namely, the Bishop of Sodor and Man, and W. Mills Pulley. With respect to the Bishop of Sodor and Man, it was not necessary to name his residence: and, some of the parties being sufficiently described to enable the plaintiff to amend his bill, it is immaterial that the residence of one is omitted.

It was said, by the plaintiff's counsel, that the debentures were assignable; and that the plea ought to have averred that they remained in the hands of the persons to whom they were originally given: but I do not think that any such averment was necessary; because it must be presumed that the debentures remain with the original holders of them, until the contrary is shown: besides, the plea alleges that the parties are, or claim to be, interested in the subject matter of the suit; and that allegation is a sufficient answer to this second objection.

It was then said that the plea does not aver that no persons, besides those mentioned in the plea, have an interest in the subject of the suit. But it was not necessary to make any such averment. It was quite sufficient to state that the twenty-six persons are interested in the suit.

Then it was said that a plea must add to the contents of the bill, but that this plea did not do so, nor did it give any information as to the priorities of the several creditors. The plea, however, does add to the contents of the bill; and it could give no information as to the priorities, which the bill itself seeks to have ascertained and declared by the court.

The last and most important objection is that which regards the number of the persons, who, it is stated, ought to be made parties to the suit. I accede to the rule laid down in Adair *v.* The New River Company. That rule, however, applies only to cases where there is one general right in all the parties, that is, where the character of all parties, so far as the right is concerned, is homogeneous: as in suits to establish a modus, or a right of suit to a mill. Notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with. Thus, if a bill is filed to have the benefit of a charge on an estate, all persons must be made parties who claim an interest in the charge. In this case, where the question is priority of charge, the very nature of the question makes it necessary that all the creditors should be parties; it implies a contest with every other person claiming an interest in the land. The circumstance of the persons named in the plea being judgment creditors, does not remove the difficulty; for there may have been releases, assignments, want of docketting, and other circumstances affecting each claim.

I am, therefore, of opinion, that all the persons named in the plea are necessary parties to the suit; and, consequently, the plea must be allowed. But I shall give the plaintiff leave to amend his bill, for the purpose of making them parties.

Foley *v.* Parry.

5 *Simons*, 138.

Testator gave his real and personal estates to his wife, for life, remainder to his great-nephew, F. W. son of his *late* nephew, and expressed it to be his particular wish and request that his wife, together with F. W.'s grandfather, should superintend and take care of his education, so as to fit him for any respectable profession or employment: Held, that F. W. was entitled to be maintained and educated, during his minority, in the manner described, out of the income of the testator's estates.

January 14, 1832.

WILLIAM PARRY, Esq., by his will, dated the 12th of June, 1812, devised his capital messuage or mansion-house, called the Ware, situated in the parish of Kenchester, in the county of Hereford, and all other his real estates, situate in, or adjoining to the parish of Kenchester, unto Edwin Sandys Lechmere and Bigoe Charles Williams, and their heirs, to the use of his wife, the defendant Jane Parry, for her life, with remainder to his great-nephew, the plaintiff, son of his *late* nephew, William Foley, for his life, with remainders to the sons and daughters of the plaintiff, successively, in tail, with remainder to Thomas Mell in fee. And the testator bequeathed all his plate, linen, china, books, household goods, furniture, farming stock and other effects whatsoever, which, at his death, should be in and about his mansion-house (except money and securities for money), to his wife, for her own absolute use and benefit; and, after giving various legacies and annuities, he gave all the residue of his real and personal estate to his wife, and Bigoe Charles Williams, absolutely, upon trust, to sell the same, and to stand possessed of the produce thereof, in trust, thereout, to pay his funeral and testamentary expenses, debts and legacies, and to invest the residue on real or government securities, and to stand possessed of such securities, in trust to pay the annuities given by his will, and, subject thereto, in trust to pay the dividends and interest thereof to his wife, for her life, and, after her decease, in trust for the plaintiff, his executors, administrators, and assigns, and to assign and transfer the capital thereof, accordingly, on his attaining the age of twenty-one years. The testator then expressed himself as follows: "*It is my particular wish and request that my dear wife and Walter Williams, Esq., the grandfather of the said Walter William Foley* (the plaintiff) *will superintend and take care of his education, so as to fit him for any respectable profession or employment.*" And the testator appointed his wife and Bigoe Charles Williams executrix and executor of his will.

The testator died in November, 1813, leaving the plaintiff and Thomas Mell his co-heirs at law.

The bill stated that the testator, in his lifetime, placed the plaintiff at school, and paid the expenses of his education and maintenance, and continued to maintain and support him until his death, and that, but for such support, the plaintiff could not have been educated and maintained so as to fit him for any respectable profession or employment, the plaintiff's

mother being a widow, and living abroad, and being wholly unable to contribute to his support: that Jane Parry, the testator's widow, never superintended or took care of the plaintiff's education, or supplied him with necessaries, and that, after the testator's death, he was compelled to procure himself to be educated and maintained, and fitted for a respectable profession, by pledging his own responsibility: that, in April, 1826, the plaintiff attained twenty-one: that he was liable for the food, clothing and other necessaries supplied to him during his minority, and had also incurred liabilities for putting himself out as an articled clerk to an attorney during his minority, so as to fit him for the profession of a solicitor, and had also incurred liabilities for his necessary sustenance and support, since he attained twenty-one: that Mrs. Parry had refused to pay him a sufficient sum of money to enable him to pay off the debts and liabilities so incurred by him, and to reimburse him the expenses necessarily incurred in his maintenance and education. The bill charged that the aforesaid request in the will was intended to be, and was, obligatory on Mrs. Parry, and that, according to the plain intent of the will, the testator's real and personal estates were devised and bequeathed to Mrs. Parry for her life, in the trust and confidence that she would sustain the expense of educating the plaintiff and qualifying him for a respectable profession, more especially as the testator wholly supported him down to the time of his death, and that the plaintiff had no property out of which he could have been educated and supported as contemplated by the will: and that the plaintiff had been compelled, in order to discharge the liabilities which he had incurred, to sell two-third parts of his share and interest in the sum of 8733*l.* 8*s.* 7*d.* three per cent consols, part of the trust funds belonging to the testator's estate, to the defendants Bell, Chapman and Wray.

The bill prayed that the will might be established, and the trusts performed, and that the usual accounts might be taken of the testator's real and personal estates, and that it might be declared that, according to the true construction of the will, the plaintiff ought to have been maintained and educated, so as to fit him for a respectable profession, out of the annual income of the testator's estate, or, at least, out of the capital of his residuary estate so devised and bequeathed as aforesaid: and that it might be referred to one of the Masters of the Court to take an account of the expenses so incurred as aforesaid in the maintenance and education of the plaintiff and the fitting him for the profession of a solicitor: and, in case the court should be of opinion that the same ought to have been found and paid, by Mrs. Parry, out of the rents and annual proceeds of the trust property, then that she might be ordered to pay, to the plaintiff, what the Master should report to be due: and, in case the court should be of opinion that the same ought to have been paid out of the capital of the residuary trust property, then that a sufficient part of such trust property might be applied for that purpose: and that it might be referred to the Master to approve of a proper sum to be allowed and paid, for the future maintenance of the plaintiff, out of the income or capital of the trust funds.

Mrs. Parry, by her answer, said that, in 1810, the testator, with the concurrence of the plaintiff's grandfather, (the plaintiff's father having then lately left this country for India,) placed the plaintiff at school, and paid for his education, up to Midsummer, 1813, out of 190*l.*, which was left with the testator by the plaintiff's father for that purpose, save that

[Foley *v.* Parry.—5 Sim. 138.]

13*l.* 7*s.*, for one moiety of the plaintiff's school bill for the half year ending at Midsummer, 1813, and 2*l.* 8*s.* for his clothes, were paid, by the testator, out of his own pocket; and, save as before mentioned, she denied that the testator placed the plaintiff at school, and paid for his education, or maintained and supported him: she admitted that she and the plaintiff's grandfather paid, equally between them, the plaintiff's school bill from Midsummer to Christmas, 1813: the defendant further said that the balance of the 190*l.* remaining in the testator's hands at his death (which amounted to 80*l.* only), was accounted for and paid, to Walter Williams, who was the executor of the plaintiff's father, by the testator's executors.

It appeared by the evidence of two schoolmasters at whose schools the plaintiff had been successively placed, by the testator, between Midsummer, 1810, and Midsummer, 1813, that the testator had, during that time, paid for the plaintiff's board and education. On the other hand, evidence was adduced, on behalf of Mrs. Parry, to prove that such payment was made as alleged in her answer.

Sir E. Sugden and Mr. Spence, for the plaintiff:

The question is, whether, in consequence of the request contained in the will, Mrs. Parry became liable to provide for the maintenance and education of the plaintiff, so as to fit him for a respectable profession or employment. With a view to the decision of that question, the court has a right to look at the evidence, in order that it may know all the facts which the testator, himself, was in possession of. There can be no doubt as to the intention; the only question is whether the words used by the testator, are sufficient to enable the court to give effect to it. The testator had placed himself in *loco parentis* to the plaintiff. The testator, in making the request, joined the grandfather with his wife, because the latter might die during the plaintiff's minority, and then the grandfather would be enabled to provide for the plaintiff's maintenance and education, out of the testator's property. There is but one direction: and, as that was to be fulfilled out of the testator's estate after the death of the wife, there must have been the same intention during the life of the wife. It was impossible for Mrs. Parry to superintend and take care of the plaintiff's education, unless the funds were supplied by her out of the testator's property; and, by paying a moiety of the charge for the plaintiff's board and education from Midsummer to Christmas, 1813, she acknowledged her liability immediately after the testator's death.

Mr. Knight and Mr. Duckworth for the defendant, Mrs. Parry:

The request in the will is addressed as strongly to the grandfather as it is to the wife. The former took nothing under the will; and, consequently, no funds were provided out of which he was to pay for the maintenance and education of the plaintiff. The evidence shows that the father had left a sum of money in the hands of the testator, to provide for the plaintiff's education, and that payments were made, by the testator, for that purpose, out of that fund; and that, after the testator's death, an account was settled, and the balance was paid over, to Mr. Williams, who was the executor of the plaintiff's father, by the testator's executors. It is plain therefore that the fund which had been provided for the plaintiff's education, was not exhausted at the date of the testator's will, as there was a balance in his hands at his death.

Sir. E. Sugden, in reply:

The evidence for the defendant, Mrs. Parry, is in our favour. At the date of the will, the plaintiff's father was dead, and the testator knew it; for he speaks of him as his *late* nephew. The testator also knew that all that the plaintiff had left to fit him for a respectable profession or employment, was the small sum of 80*l.*; and the plaintiff's minority lasted till April, 1826. If Mr. Williams had been a legatee, there would have been more difficulty in the case, as the court would not have known how to apportion the charge between him and the testator's widow.

Mr. Garratt appeared for the other defendants.

The Vice-Chancellor:—I doubt whether I am at liberty to look at the evidence in this case. The question must, I think, be decided upon the words of the will alone. It appears that the testator, at the time when he made his will, knew that the plaintiff's father was dead: for he mentions him as the son of his *late* nephew. The testator then made his will, by which he gave his mansion-house and estate in the parish of Kenchester, to the defendant, Mrs. Parry, for her life, with remainder to the plaintiff, for his life, with remainders to the plaintiff's sons and daughters, in tail, with remainder over. He then bequeathed his plate, household goods and furniture, and other effects in his mansion-house, to his wife, absolutely: and he also gave to her and to C. Bigoe Williams, the residue of his real and personal estate, in trust to sell, and, after paying his funeral and testamentary expenses, debts and legacies, in trust for Mrs. Parry for her life, and, after her decease, in trust for the plaintiff, and to be paid and assigned to him on his attaining twenty-one: and then the testator uses these words: "It is my particular wish and request that my dear wife, and Walter Williams, Esq., the grandfather of the said Walter William Foley, will superintend and take care of his education, so as to fit him for any respectable profession or employment." If the testator had said: "I direct that my great-nephew shall be educated so as to fit him for any respectable profession or employment," that direction would have been taken to be a gift, to his great-nephew, of the funds necessary for his education, just as much as if the testator had said, in more extended phraseology, that it was his wish that his great-nephew should be educated so as to fit him for any respectable profession or employment, and that the expenses of his education should be paid out of his estate. Here the testator has joined the request that his great-nephew should be educated, with the request that Mrs. Parry and Mr. Williams should superintend his education. For it is manifest that what the testator requires, is the education of his great-nephew, as well as the superintendence of his widow and Mr. Williams. Words of request are as much words of legation as a direct gift; and there are several cases which decide that terms of request do amount to a gift to the person in whose favour the request is made. And I am of opinion that the request contained in this will is a gift, to the plaintiff, of the expenses of his education: and education must include maintenance.

Declare that, according to the true construction of the will, the plaintiff was entitled to be maintained and educated, from the decease of the testator up to the time when he attained twenty-one, in such a manner as to fit him for any respectable profession or employment, out of the rents, profits and annual income of the testator's real and personal estates,

which accrued after his death, regard being had to the fortune given to him by the will, and which he is entitled to, expectant on the death of Mrs. Parry. Refer it to the Master to inquire what sums have been properly expended and incurred, since the testator's decease, by or for the plaintiff, in such maintenance and education, and in fitting him for the professon of a solicitor, regard being had to the fortune given to him as aforesaid, and, in making such inquiry, Mrs. Parry is to be allowed the sum of 80*l.* paid by her to the plaintiff's grandfather, on the 28th of May, 1814.*

Manners *v.* Bryan.

5 *Simons*, 147.

In computing the eight days within which cause must be shown against confirming a report absolutely, the day on which the order *nisi* was served, must be reckoned: but, if the eighth day is a holiday, one day more will be allowed. But *see* the note at the end of this case.

June 19, 21, 1832.

BY the decree in this cause, dated the 3d of March, 1830, it was referred to the Master to inquire whether the defendant, Bryan, was, at the date of the agreement in the pleadings mentioned, able to make a valid sale of the portion of the fund coming to him in right of his wife. On the 12th of March, 1832, the Master reported in the negative: and, on the 13th, it was ordered that the report should be confirmed, unless the defendant should, within eight days after notice of that order, show good cause to the contrary. On the 14th, the plaintiff's solicitor served the defendant's clerk in court with notice of the order, in the usual manner. On the 21st, which was a general feast-day, the offices were closed. On the 22d, the order *nisi* was made absolute, on the registrar's certificate of no cause having been shown. On the same day the defendant, having filed exceptions to the report, obtained an order, by petition at the Rolls, that the exceptions might be set down for argument: but that order was not passed and entered till the 23d.

A motion was now made, on behalf of the defendant, to discharge the order confirming the report absolutely, for irregularity.

The motion was supported by an affidavit, in which it was stated that the order for setting down the exceptions was passed and entered on the 22d of March.

Mr. Knight and Mr. Koe, in support of the motion, said that the 21st

* Affirmed by the Lord Chancellor, on the 25th of November, 1833. The judgment proceeded upon the clause containing the request, taken in connection with the general contents of the will: and his lordship observed that the testator comprehended the grandfather in the request, with a view to obtaining, for his widow, the assistance of that male relative of the plaintiff, in performing those offices, the expense of which the widow was to defray out of the legacy to her. See Benson *v.* Whittam, 5 Sim. 22.

of March having been a holiday, was not to be reckoned as one of the eight days within which the defendant was to show cause against confirming the report absolutely: and that the order for setting down the exceptions having been passed and entered on the 22d of March, the order for confirming the report absolutely was irregular. Bullock *v.* Edington, 1 Sim. 481.

Mr. Pepys and Mr. Ellison opposed the motion.

The entering clerk's day-book having been produced in court, it appeared that the order for setting down the exceptions was not brought to him to be passed and entered till the *twenty-third* of March.

The Vice-Chancellor said that, as the fast-day was the last of the eight days, it was not to be reckoned; but, if it had been one of the intermediate days, it ought to have been counted: that the registrar had informed him that it was the practice to reckon the day on which the notice of the order for confirming the report *nisi* was served, as one of the eight days; and that he should not disturb that practice: but that, as the decision in Bullock *v.* Edington afforded a ground on which the defendant might hope to succeed, he should refuse the motion without costs.*

Gillibrand *v.* Goold.

5 *Simons*, 149.

Where, under a settlement, a sum of money is to be raised, out of real estates, for the portions of younger children, and some of the portions have become payable, the court will raise the whole sum at once, although some of the children have not acquired vested interests.

December 10, 1833.

BY indentures of lease and release, bearing date the 10th and 11th days of August, 1801, executed in pursuance of articles made on the marriage of Thomas Gillibrand, Esq. and Miss Marcella Goold in the preceding month of March, certain estates (consisting of a moiety of a manor, and the messuages, rents and hereditaments therein described) were conveyed to the use of Thomas Gillibrand, for life, with remainder (subject to a limitation to trustees to preserve contingent remainders, and to a rent-charge of 500*l.*, to Mrs. Gillibrand, during her life, in case she should survive the said Thomas Gillibrand), to S. H. Fazakerley and G. Goold (of whom the defendant Goold was the survivor) for five hundred years, upon the trusts after-mentioned, with remainder to the first and other sons of Mr. and Mrs. Gillibrand, in tail male. The trusts of the term of five hundred years, after providing for better securing the rent-charge of 500*l.* out of the rents or by sale or mortgage, were declared as

* A motion to discharge the above order, and also the order confirming the report absolutely, was refused, by the Lord Chancellor, on the 14th of February, 1833. His lordship stated that the registrar had informed him that the time for showing cause against confirming the report absolutely, expired on the 21st of March, though it was a holiday, but that no certificate would have been granted till the morning of the 22d.

[Gillibrand *v.* Goold.—5 Sim. 149.]

follows: "And, subject to the aforesaid trusts and without prejudice thereto, upon this further trust and confidence that, in case there shall be one or more child or children of the said Thomas Gillibrand by the said Marcella Gillibrand (other than and except an eldest or only son), then and in such case, they, the said S. H. Fazakerley and G. Goold, or the survivor of them, or the executors, administrators or assigns of such survivor, do and shall, after the decease of the said Thomas Gillibrand (or in his lifetime, if he shall so direct, by any deed or instrument in writing, signed by him in the presence of and attested by two or more credible witnesses), by mortgage, sale, or any other disposition of the said manor, capital and other messuages, rents, hereditaments and premises comprised in the said term of five hundred years, or any of them, or any part thereof, for all or any part of the same term, or by and out of the rents, issues and profits thereof respectively (but subject to the said annual sum or yearly rent-charge of 500*l.* and the powers and remedies hereinbefore contained for compelling payment thereof) levy and raise, for the portion or portions of all and every such child or children (other than and except an eldest or only son) such sum or sums of money as is or are hereinafter mentioned, (that is to say) if there shall be but one such child, whether a son or daughter, the sum of 6000*l.* of like lawful money, for the portion of such one child, and, if there shall be two such children and no more, be the same sons or daughters, or a son and a daughter, then the sum of 8000*l.* of like lawful money, for the portions of such two children, and, if there shall be three or more such younger children, be the same sons or daughters, or be there both sons and daughters, then the sum of 10,000*l.* of like lawful money, for the portions of such three or more children; the said several sums of 6000*l.*, 8000*l.*, or 10,000*l.*, as the case may happen, to become and be an interest vested and transmissible, in such child or children respectively who shall be a son or sons, at his or their respective age or ages of twenty-one years, and in such of them as shall be a daughter or daughters, at her or their respective age or ages of twenty-one years, or day or respective days of marriage, which shall first happen, and to be paid to him, her or them respectively, on or at the same age, day or time, if the same shall happen after the decease of the said Thomas Gillibrand, but, if the same shall happen in his lifetime, then immediately after his decease."

Then followed provisoes of survivorship and accruer in case any son or sons should die or become an eldest son, under twenty-one, or any daughter or daughters should die under twenty-one, without having been married, but no such one, two, three or more children were to be entitled to more than the sums above-mentioned.

"Provided also, and it is hereby further agreed and declared, between and by the parties to these presents, that it shall and may be lawful to and for the said S. H. Fazakerley and G. Goold, and the survivor of them, and the executors, administrators and assigns of such survivor, at any time or times after the decease of the said Thomas Gillibrand (or in his lifetime, in case he shall so direct by any writing or writings under his hand) to levy and raise, by the ways and means aforesaid (but subject and without prejudice as hereinbefore is mentioned) a part of the portion or portions intended to be hereby provided for such younger sons or daughters as aforesaid, not exceeding, in the whole, for any one such child, one moiety or equal half part or share of his, her, or their expectant portion, and to pay and apply the moiety so to be raised for the pre-

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ferment and advancement or benefit of such child, in such manner as the said S. H. Fazakerley and G. Goold, or the survivor of them, or executors, administrators or assigns of such survivor, shall, in their or his discretion, think fit, notwithstanding the portion or portions of such child or children shall not then have become vested or payable: and upon this further trust, that they, the said S. H. Fazakerley and G. Goold, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, after the decease of the said Thomas Gillibrand (but nevertheless subject and without prejudice as aforesaid) by and out of the annual rents, issues and profits of the moiety of the said manor, rents, hereditaments and premises comprised in the said term of five hundred years, or any part or parts thereof, levy and raise for the maintenance and education of the child and children, for the time being, of the said Thomas Gillibrand by the said Marcella Gillibrand, for whom a portion or portions is or are intended to be hereby provided as aforesaid, in the meantime and until his, her or their portion or respective portions shall become payable, such yearly sum or sums of money as the said Thomas Gillibrand, at any time during his life, by any writing with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed by him in the presence of and attested by three or more credible witnesses, shall direct or appoint, not exceeding what the interest of the portion or portions intended to be hereby provided for such child or children respectively, would amount to, at the rate of 4*l.* for every 100*l.* by the year, were he, she or they then entitled thereto, and, in default of such direction or appointment, then such yearly sum or sums of money, not exceeding the amount of such interest as aforesaid, as the said S. H. Fazakerley and G. Goold, or the survivor of them, or the executors, administrators or assigns of such survivor, shall think fit, the said yearly sum or sums of money for maintenance, to be free and clear of and from all deductions for taxes or otherwise, and to be raised and paid by four equal quarterly payments, on or at the four feasts, or days of payment hereinbefore mentioned, and the first of the same quarterly payments to be made on such of the said days as shall happen next after the decease of the said Thomas Gillibrand."

It was then provided that the trustees should not mortgage any part of the premises, until some one of the said portions should become payable, and that the rents, or so much as should remain after payment of the said annual sums for maintenance, should, until some one of such portions should become payable, be received by the person or persons entitled in remainder, expectant on the term. There was then a proviso declaring that any sum advanced by Thomas Gillibrand to any of his younger children, should go in or towards satisfaction of his or her portion, unless he should declare the contrary; and, lastly, a proviso for cesser of the term.

In December, 1828, Mr. Gillibrand died, leaving eight children surviving him. The defendant Fazakerley, who had assumed that name, was the second son of the marriage, but he had then become the eldest son and tenant in tail male in possession under the settlement. The plaintiffs were the other sons and daughters: four of them had attained twenty-one, and three were under that age. The object of the bill was to have their portions raised.

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Sir E. Sugden and Mr. Parry, for the plaintiffs, submitted that the whole 10,000*l.* ought now to be raised.

Mr. Walker, for the defendant Fazakerley:

My client is willing to pay the whole sum, if he can safely do so; but I submit that only the shares of the children who have attained twenty-one, can be raised. It is a question in which almost every landed proprietor in the kingdom, as well as younger children whose portions are charged on lands, are interested. The object, in all these cases, is that the children shall have the security of the estate. The case of Wynter *v.* Bold, 1 Sim. & Stu. 507, is an authority that the whole need not be raised at once: and Dickinson *v.* Dickinson, 3 Bro. C. C. 19, is an authority that, where there is no direction to appropriate the money, it cannot be raised before it is payable, and that the land is not discharged even by an investment under a decree.

[The Vice-Chancellor:—Suppose there are ten younger children, are there to be ten mortgages?]

Mr. Walker:—No one can deny the weight of that objection to the construction contended for, but the answer to it is that, if such were the true construction of the settlement, it is immaterial, and the inconvenience is trifling, when it is considered that the remainder-man can always relieve himself by payment. If 10,000*l.* can be raised now, the same sum might, and, if the true construction is that one mortgage only is to be made, must have been raised, had one child required it on attaining twenty-one. Are the other six to be subject to the fluctuation in the value of the securities, and to the danger from insolvency of trustees, and other causes of losing their property? If more than one mortgage is authorized to be made, why are the three children now under age to be subjected to these chances, and to be deprived of the security of this ample estate, and to take a less rate of interest than they are now receiving? Besides, it will violate another principle, namely, that portions are not to be raised out of real estates, unless they become payable. Suppose one child had attained twenty-one and required its portion, and the other children had died without becoming entitled, 10,000*l.* would have been raised, although 6000*l.* only would have been wanted and the 4000*l.* might have been left; and, if 6000*l.* had been raised, how is that sum and what remains to be raised, to be divided amongst the children as they become entitled; and, if the sum raised is improperly spent, how is the loss to be borne? In this case, the estate is the security contemplated until payment. There is no power to the trustees to give receipts, and no direction to appropriate the money. The advancement clause, as well as other clauses, contemplate that part only may be raised at one time. The maintenance clause directs a portion of the rents to be applied in maintenance, until the portions become payable. The succeeding clause, that no mortgage is to be made until some one of the portions becomes payable, does not afford any inference that one mortgage only is to be made. It was intended to guard against any sum being raised out of the term, while it was in reversion or remainder.

The Vice-Chancellor:—The whole 10,000*l.*, as I understand, has become raisable. In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The

whole 10,000*l.* must, therefore, be raised at once. It is said that some of the shares may become diminished in amount: the answer to that is that the court considers the investment in the three per cent consols as equivalent to payment. If there is any rise in the funds, the children under age will have the benefit of it.

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5 Simons, 156.

Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission may be made a rule of a court of law, on the application of either party, but that has not been done: Held, on demurrer, that this court has jurisdiction to relieve against the award. And the court having once exercised its jurisdiction over the award, will retain it, although, on the coming in of the answer, it appears that the submission had then been made a rule of a court of law, by the defendant.

December 5, 1833. January 11, 1834.

THE defendant had occupied a farm, as tenant to the plaintiff, from Michaelmas 1823 to Michaelmas 1832; and, being on the 11th of September, in that year, indebted to the plaintiff in 610*l.* for rent of the farm, he, for securing such debt, assigned, to the plaintiff, his household furniture, stock, crops and other effects on the farm. The plaintiff afterwards sold the articles so assigned to him, and applied the proceeds, which, it was alleged, were more than sufficient to pay the debt, to his own use. Disputes and differences having arisen, between the parties, as to the value of the articles sold, and also as to the management and occupation of the farm during the defendant's tenancy, by articles of agreement dated the 12th of August, 1833, the parties agreed to refer such disputes and differences, and all other controversies then existing between them, to the determination of two persons therein named, provided they made their award within a month from the date of the articles of agreement; and, in case the arbitrators should not agree upon their award, within that time, then to the determination of an umpire to be appointed by them, provided he should make his award, in writing, under his hand and seal, within a month from the time of the reference to him: and it was further agreed that no action, suit, or proceeding at law, or in equity, should be commenced or prosecuted, by either of the parties to the agreement, against the other of them, in relation to the matters and things aforesaid, or any of them, until the award or umpirage should have been made and delivered, or the arbitrators or their umpire should have declined or neglected to make their, or his, award or umpirage within the respective times thereby limited for that purpose. And is was further agreed that the said reference or submission, should or might be made a rule of the Court of King's Bench, on the application of either of the parties thereto, and that no action or suit at law or in equity, should be commenced or prosecuted against the arbitrators or umpire, concerning their or his award or determination, after the same should have been so made as aforesaid, nor to impeach the said award or umpirage unless some collusion or other

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fraud should be discovered therein. And each of the parties bound himself to the other, in 500*l.*, for the due performance of the award or umpirage on his part: and it was further agreed that all fees and moneys which the arbitrators or umpire should think proper to give, to any counsel or others, for advice or otherwise, relative to the premises, and all other reasonable expenses attending the award or umpirage, and also the costs of preparing the articles of agreement, and of all matters and things in relation to the reference, should abide the event of the award, and be borne and paid, by the party of parties, and at such time as the same should, thereby, be directed to be paid and borne.

The arbitrators took upon themselves the reference, but not agreeing in their award, they, in pursuance of the power given to them by the agreement, appointed an umpire, who made his award, by a deed-poll, dated the 12th October, 1833, and thereby directed that the plaintiff should, on the 1st of November then next, pay, to the defendant, the sum of 208*l.* 10*s.*, and that the same should be received, by the defendant, in full satisfaction and discharge of and for all the matters in difference; and that all such fees, moneys, expenses and costs as, by the articles of agreement, it was agreed should abide the event of the award, should be paid at the time before appointed for payment of the 208*l.* 10*s.*

The bill which was filed on the 4th of November, 1833, stated that the umpire had not, by his award, made a full and final arbitrament or determination of all the matters referred to him, and that, thereby, the plaintiff had not all the advantages, which, under the articles of agreement, he was entitled to, but that the award was defective, and ought to be set aside. The bill charged that the costs and expenses which the plaintiff had been put to, relating to the articles of agreement and the award, amounted to a very considerable sum; and that the defendant had not, at the time of filing the bill, made, but that he forthwith intended to make, the submission to refer to arbitration contained in the articles of agreement, a rule of the Court of King's Bench or of one of the other Courts of Record, under the statute in that case made and provided, and to take proceedings upon the rule, when obtained, against the plaintiff, or otherwise to bring an action against him, in one of the Courts of Law upon the award.

The bill prayed that the award might be declared void, and that the defendant might be decreed to deliver it up to be cancelled, together with the articles of agreement, and that, in the mean time, he might be restrained from making the submission to refer to arbitration, contained in the articles of agreement, a rule of the Court of King's Bench, or of any other court of record, and from bringing any action at law, against the plaintiff, upon the articles of agreement and award, or either of them; or that, in case, after having been served with a *subpœna* to appear and answer the bill, and before the injunction should be granted, the defendant should proceed to make the submission a rule of court, then that he might be perpetually restrained from taking any proceedings upon the rule so obtained, and from commencing or continuing any action or suit, at law or in equity, upon the articles of agreement and award, or either of them.

The defendant, on the 18th of November, 1833, put in a general demurrer.*

* By 9 & 10 Will. 3. c. 15, s. 1, it is enacted that it shall be lawful for all mer-

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Mr. Pepys and Mr. Purvis, for the demurrer, relied on Davis *v.* Getty, 1 Sim. & Stu. 411; Dawson *v.* Sadler, ibid. 537, and contended, upon the authority of that case, that the parties having agreed that the submission should be made a rule of the Court of King's Bench, that court alone had jurisdiction to set aside the award.

Sir E. Sugden and Mr. Webster in support of the bill:

The 9 & 10 Will. 3. c. 15, does not take away the jurisdiction of a Court of Equity to set aside an award, where it is void on the face of it. That statute does not make it imperative on the parties to make the submission a rule of court. They have an option to do so or not. The Master of the Rolls is wrong therefore in saying that the parties must take advantage of the act, and that the party complaining of the award, is bound to make the submission a rule of court, if he wishes to have the award set aside. Suppose a party considers himself to be aggrieved by an award, and that the time allowed, by the statute, for setting it aside, has elapsed, he must, if the Master of the Rolls be correct, go and make the submission a rule of court, and, by that very act, he excludes himself from all remedy; for it is too late to apply to have the award set aside; and, after the submission has been made a rule of one court, no other court can have jurisdiction. Lord Lonsdale *v.* Littledale, 2 Ves. 451; Nichols *v.* Chalie, 14 Ves. 265.

The decision in Gwinett *v.* Bannister, 14 Ves. 530, is founded, expressly, on the ground of the submission having been made a rule of

chants and traders, and others desiring to end any controversy, suit or quarrel, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall, thereupon, be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission, and, in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court, on motion, shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear, on oath, to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption or other undue means.

By section 2, it is further enacted that any arbitration or umpirage procured by corruption, or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties.

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court. In Steff *v.* Andrews, 2 Mad. 6, the Vice-Chancellor overruled the plea because it stated no new matter. One of the statements in the plea, was the agreement of the parties that the submission should be made a rule of the Court of Common Pleas. Sir Thomas Plumer says: "A mere submission to make an award a rule of court, is unimportant, unless it actually was made a rule of court." The whole point depends upon the opinion of the Master of the Rolls. Unless the statute clearly excludes the jurisdiction of this court, it is not to be considered as taken away. Street *v.* Rigby, 6 Ves. 815. The agreement of the parties cannot have the effect of ousting the jurisdiction.

[The Vice-Chancellor:—According to the decision of the Master of the Rolls in Davis *v.* Getty, the Lord Chancellor had no jurisdiction to set aside the award in Ward *v.* Periam, 2 Eq. Abr. 91, and 1 Turn. & Russ. 131, note.]

Mr. Purvis, in reply:

This is not a question upon an agreement between the parties ousting the jurisdiction of the court, but whether one of the parties is to have the power of transferring the jurisdiction from a court which both have chosen. The statute gives the parties an option as to the court: the words are "any of his majesty's courts of record which the parties shall choose:" but, when the selection has been made of a particular court, the jurisdiction is confined to that court, and from it process is to issue, and the process is not to be delayed, "by any order, rule, command, or process of any other court, either of law or equity." The statute was passed for the final determination of controversies; and all the provisions are made with that view. If the jurisdiction of other courts be not excluded, the statute would not be an advantage to the parties, but the reverse.*

The Vice-Chancellor:—This is a case of great importance; I shall not decide it without great consideration.

January 11, 1834.—The Vice-Chancellor:—It is clear, from the case of Brown *v.* Brown, 1 Vern. 157, that, before the statute, where an agreement to refer had been made a rule of a Court of Law, the Court of Chancery would entertain jurisdiction over the award. In that case the Lord Keeper dismissed the bill; not because he had no jurisdiction to entertain it, for he did entertain it, and, after long debate, as Vernon says, dismissed the bill for want of merits. The statute was passed in 1698; and it is equally clear that, after the statute, where the agreement to refer is made a rule of a Court of Law, in an action depending in it, this court will entertain jurisdiction over the award. This appears from Lord Lonsdale *v.* Littledale, 2 Ves. jun. 451, which was decided, by Lord Rosslyn, in 1794; and the language used by Lord Eldon, in Nichols *v.* Chalie, 14 Ves. 268, confirms this proposition. In Ward *v.* Periant, the submission had been made a rule of the Court of King's Bench, on the plaintiff's own application. Yet, on the plaintiff's bill, Lord Chancellor Macclesfield set aside the award with costs. Lord Hardwicke, in Chicot *v.* Lequesne, 2 Ves. 317, comments on this decision, and says that Lord Macclesfield considered the case the same as if

* The arguments are reported *ex relatione.*

† In note to Auriol *v.* Smith, 1 Turn. & Russ. 131.

a Court of Common Law had refused to exercise its jurisdiction. But the defendant's argument is that the mere agreement to refer and make the submission a rule of a court of law, takes away the jurisdiction of the Court of Chancery. Lord Hardwicke, in the case which I have just mentioned, expressly says that the decree in Ward *v.* Periam, was very just, which it could not have been, if the court had jurisdiction. In Spettigue *v.* Carpenter, 3 P. W. 361, after the submission had been a rule of the Court of Chancery, Lord Talbot, on bill filed, set aside an award. He, therefore, must have held that the general jurisdiction by bill, remained, notwithstanding the particular jurisdiction by process of contempt given by the statute. What was done in Kampshire *v.* Young, 2 Atk. 155, seems to show that the court has jurisdiction, although not only had the submission been made a rule of the Court of King's Bench, but an attachment had issued for not obeying it. In Hutchison *v.* Hodgson, 2 Anstr. 361, (an ill-reported case), the submission had been made a rule of the Court of King's Bench. In Nichols *v.* Chalie, 14 Ves. 265, the reference was made under the statute, and the submission had been made an order of the Court of King's Bench, and it is, therefore, with reference to that circumstance, and upon the supposition that the Court of King's Bench would act, that Lord Eldon must be understood to say: "If the reference is within the statute, the legislature has declared that a Court of Equity shall have nothing to do with it." In Gwinett *v.* Bannister, 14 Ves. 530, also, the reference was under the statute, and the submission had been made a rule of the Court of King's Bench, and the common injunction having been obtained, Lord Eldon dissolved it, on the ground that this court had no jurisdiction to set aside the award.

In Steff *v.* Andrews, 2 Madd. 10, Sir T. Plumer says: "A mere submission to make an award a rule of court, is unimportant, unless it actually was made a rule of court. If made a rule of court, this court could not act; the jurisdiction would be transferred to the court in which the submission was made a rule; but, if the submission is not acted upon, no other court acquires jurisdiction." After this came the case of Davis *v.* Getty, 1 Sim. & Stu. 411. There the submission was not made a rule of court, and his Honour, the present Master of the Rolls, held he had no jurisdiction. He, however, merely reasoned on the statute, and did not cite any authority. In the subsequent case of Dawson *v.* Sadler, 1 Sim. & Stu. 537, the submission was made a rule of the Court of King's Bench, before the motion was made; and, therefore, his Honour might well say, after Gwinett *v.* Bannister had been cited by counsel, that the authority referred to had, in effect, determined the question, and, consistently with prior decision, refuse the motion.

The question, therefore, is, which of the two learned judges who preceded me, is right. To me it appears that, upon the words of the statute, the original, inherent jurisdiction of this court, is not taken away, except where the submission has been made a rule of a court of law; and the authorities show that, even in that case, it is not, of necessity, taken away, but will remain, in case the court of law will not, or cannot act upon the award. I am not aware of any authority upon which the decision in Davis *v.* Getty can be supported. But I do see authority which shows that the original jurisdiction of this court over awards, does remain, even in cases where the submission has been made a rule of court under the statute. In this case, I cannot assume that the Court of

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King's Bench will, after the submission has been made a rule of court, act upon the award. In my opinion, therefore, the demurrer must be overruled. But, as I have the misfortune to differ from the Master of the Rolls, I shall be most satisfied if the judgment of a higher tribunal will put the question at rest.

March 26.—On the 16th November, 1833, the defendant caused the submission to arbitration to be made a rule of the Court of King's Bench. On the 17th of January following, the plaintiff obtained the common injunction for want of an answer: and, on the 13th February, the answer was filed, admitting the agreement and the award, and stating that, in Michaelmas Term then last, the defendant had caused the submission to be made a rule of the Court of King's Bench, according to the statute, and submitting that, on that account, this court had no jurisdiction, on the ground stated in the bill, if any such ground there were, to set aside the award, but that every matter and thing relating to the arbitration and award, was then properly cognizable in the Court of King's Bench, and in that court only: that the award was fair, full, and complete, and that the plaintiff had not stated, by his bill, any of the matters referred to arbitration as aforesaid, as to which he alleged that the umpire had not made a full arbitrament: that the plaintiff had all the advantages under the articles of agreement, which he was in justice and equity entitled to, and that the award was not defective, and ought not to be set aside, even if this court had jurisdiction so to do; and that the defendant intended forthwith to take proceedings, against the plaintiff, on the rule, or to bring an action, against him, on the award.

The defendant, having, on the coming in of his answer, obtained an order *nisi* to dissolve the injunction: Sir E. Sugden and Mr. Webster, for the plaintiff, now showed cause against dissolving the injunction. They said that the point decided on the argument of the demurrer, was that the ancient jurisdiction of this court remained: that the equity on which the bill was founded, was an imperfect award, which was the question to be decided at the hearing of the cause; and, as the plaintiff had a right to have the validity of the award tried in this court, the injunction must be continued.

The Solicitor-General (Sir C. Pepys) and Mr. Purvis, for the defendant, argued that the ground on which the demurrer was allowed, was that no other court had jurisdiction over the award; that the submission had been since made a rule of the Court of King's Bench, and, consequently, the jurisdiction of this court was taken away by the statute, and the Court of King's Bench alone now had jurisdiction over the award: that, by the motion, the court was asked not only to exercise its own jurisdiction, but to take away the jurisdiction of the Court of King's Bench, in which court the parties had contracted that the question should be decided: that no case was made for continuing the injunction: that the umpire had awarded a certain sum to be paid, to the defendant, in full satisfaction of all the matters in difference; which was final: that the bill did not allege on what ground the award was not final, but contained a mere, general allegation to that effect: that there was no equity whatever to prevent the defendant from receiving the sum awarded to him; and, consequently, he ought to be left to his legal remedy to recover it.

The Vice-Chancellor:—The court has decided, on the facts appear-

ing by the bill, that the plaintiff has an equity; and the answer does not displace that equity. It does, indeed, deny that the award was not final, but it leaves the facts of the case just as they were when the demurrer was argued.

In Ward *v.* Periam, it was held that, though a court of law may have acquired jurisdiction over an award, yet, if that court subsequently refuses to act, or cannot act upon the award, the ancient jurisdiction of this court is revived. *Non constat* that the court of King's Bench will act on this award. Besides, in the present case, this court acquired and exercised jurisdiction prior to the time when the submission was made a rule of a court of law; and, where a court once acquires a jurisdiction, it retains it.

A judge is bound to take notice of a prior order made in the same cause. On the argument of the demurrer, I decided that the plaintiff had an equity; and I am bound by the order which I then made; and must therefore hold that there is an equity to set aside this award.

Motion to dissolve the injunction refused.

ENGLISH

CASES IN CHANCERY.

BEFORE LORD BROUGHAM, CHANCELLOR, AND SIR JOHN LEACH, MASTER OF THE ROLLS.

Tatham *v.* Wright.

2 *Rus. & Mylne*, 1.

A motion for a new trial of two issues, was made upon three grounds: first, the alleged improper summing up of the judge; secondly, because the weight of evidence was against the verdict; and, thirdly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground, that, upon the evidence alone, without regard to the summing up of the judge, the court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

Semble. The rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

Semble. That rule does not apply, where the bill is filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to the ejectment.

November 18, 1830. April 29, 30; May 11; November 25, 1831.

THE bill was filed by the heir at law of John Marsden against the persons who took interests under a will of John Marsden, dated the 14th of June, 1822, and a codicil to it dated the 23d of February, 1825. The case stated by the plaintiff was, that the testator had been, from his youth upwards, weak, childish, and incapable of transacting business; that, for more than twenty years before his death, he had been entirely under the control of his agent and steward, the defendant George Wright; that the will and codicil had been prepared by Wright's direction; and that Marsden, without comprehending the provisions of these instruments,

which were extremely complex and artificial, executed them under Wright's control and influence. The prayer was, that the will might be declared to have been obtained by fraud and undue influence, and to be void.

The bill also alleged that the legal estate in Marsden's freeholds was outstanding, and prayed that the defendants might be restrained from setting up any outstanding legal estate as a defence to any action at law which the plaintiff might commence. The defendants by their answer stated that a considerable part of the freeholds was vested in mortgagees, but they could not further set forth whether the legal estate of any part of the testator's lands was outstanding.

Many witnesses were examined in the cause, both on the part of the plaintiff and on the part of the defendants. Among those who were examined for the defendants were Mr. Bleasdale, the Rev. Robert Procter, and Edward Tatham, the three attesting witnesses to the will and codicil. Mr. Bleasdale was the attorney who prepared the will, and had known the testator from his infancy. He deposed in the most unequivocal manner to the perfect capacity of the testator to dispose of his property,—to the due execution of the will and codicil,—to their strict conformity to the testator's instructions and wishes,—and to his perfect understanding of their import and effect.

Procter, in his examination in chief, stated that, at the time of the "execution of the will and codicil, John Marsden was of great imbecility of mind and of a weak understanding, but his memory was good on the few subjects upon which he conversed; and that he was capable of making a plain straight-forward will or codicil to a limited extent." On his cross-examination he said that, "in his opinion and belief, John Marsden was totally incompetent to transact any business, or to manage his own affairs or property, or to give any proper directions or orders about the same; that he never was capable of knowing his own property, either as to extent or value, or of buying or selling, or contracting for any thing more than ten or twenty shillings in amount, or of giving instructions for any conveyances or leases; that he was totally incapable of giving directions for making calculations of the respective values of different lands, or of understanding in the least degree such calculations when made; that John Marsden had not the power to follow his own inclinations, or to act as he wished, without the restraint or control of the defendant George Wright, in matters of consequence, and that he had not a will of his own in such matters; that he did not think John Marsden was capable of giving written instructions or directions for his will to Giles Bleasdale, or to any other person; and that, in his opinion, John Marsden was not capable of comprehending, combining together, and judging accurately of the nature and consequences of any legal instrument creating a variety of new rights and interests."

Edmund Tatham in his examination in chief stated, that John Marsden was "of weak mind and deficient understanding, but was of sufficiently sound and disposing mind, memory, and understanding to make a plain and simple will or codicil, though not to make an intricate or complicated will or codicil." In his cross examination he deposed "that John Marsden was of a weak mind and defective judgment; that he was infirm in these respects throughout the whole of the period of the witness's acquaintance with him, up to the time of his last illness, which was after the year 1825; that he was liable to be made the dupe of designing and interested

persons; that he was not capable of transacting business, or of managing his own affairs or property, or of giving proper instructions or orders about the same; that he was not capable of comprehending, combining together, or judging accurately of the nature and consequence of any legal instrument creating a variety of new rights and interests; and that he seemed to be afraid of offending Wright." Both these witnesses entered, in their cross-examination, into minute details of circumstances to corroborate their opinions of the extreme imbecility of Mr. Marsden.

Two issues of *devisavit vel non* were directed.

On the trial, the devisees, who were plaintiffs in the issues, called only Bleasdale to prove the due execution of the will and codicil, and did not examine either Procter or Tatham; but their counsel stated, that they had served *subpœnas* on both these persons; that both of them were in court, and the defendant might examine them if he pleased. The defendant did not call them.

The issues were tried at York before Mr. Justice Park: the jury found a verdict in favour of the will and codicil, and the judge was satisfied with the verdict.

A motion for a new trial was now made on behalf of the heir.

Mr. Brougham and Mr. Duckworth, for the motion.

Mr. Bickersteth, Mr. Frederick Pollock, and Mr. Walker, *contrà.*

In support of the motion it was contended, first, that the judge, in summing up, had not presented the evidence fully and fairly to the jury; secondly, that the verdict was not supported by the evidence; and thirdly, that the plaintiffs in the issues were bound to have examined all the three attesting witnesses.

The argument on the first two points consisted of a commentary on the evidence of the witnesses who had been examined on the trial, and of criticisms on the observations made by the judge.

On the third point it was contended, on behalf of the heir, that, on the trial of an issue of *devisavit vel non*, it was imperative on the party claiming under the will to examine all the three attesting witnesses. Townsend *v.* Ives, 1 Wilson, 216; Ogle *v.* Cook, 1 Ves. sen. 178; Bullun *v.* Michel, 2 Price, 399; Bootle *v.* Blundell, 19 Ves. 494; Cooper, 136. The only exception from this rule was, when the circumstances were such, that, by the common rules of evidence, proof of the witness's handwriting might be substituted for the testimony of the witness himself; as when the witness was dead, or was abroad, or was insane, or after diligent search could not be found: and it was to cases of this description that Lord Thurlow referred, when, in Powell *v.* Cleaver, 2 Bro. C. C. 504, he expressed a doubt, "whether the rule had ever been laid down so largely, that a will could not be proved without examining all the witnesses, although the practice had been to examine all."

On the other hand, the devisees contended that the rule, requiring all the attesting witnesses to be examined, applied only where the devisees came into a court of equity to have the will established. In the present case they did not ask the assistance of the court: they asked for no decree, except that the bill should be dismissed. The plaintiff in the suit had transferred the jurisdiction from a court of law to a court of equity, merely on the ground that outstanding legal estates might be set up to defeat any action which he might bring to recover possession: and, on the trial of an issue directed under such circumstances, it was sufficient to prove the will in the same way as it would have been proved in case

he had brought an ejectment. Even if the bill had been filed by the devisees to have the will established, instead of being filed against them to have the will declared void, it would not have been incumbent on them, under the special circumstances of the case, to examine Procter and Tatham. Those persons, in their depositions in the cause, had given evidence against the validity of the will and codicil, which they had solemnly attested; it would be absurd to consider them as the witnesses of the devisees, and unreasonable to require that they should be called by the parties against whom it was known they would depose. The rule was not inflexible and invariable: it would not be followed, where its observance would tend to render the result less satisfactory to the conscience of the court. The interests of truth plainly required that Procter and Tatham, if examined at all, should be examined as the witnesses of the heir, and that the adverse party should have the power of cross-examining them. The heir might have examined them at the trial: he did not choose to do so; and a new trial would not be directed merely to give him an opportunity of doing what (if his counsel had deemed it prudent) he might have done before.

The Master of the Rolls:—This is a motion for a new trial of two issues which have been directed by the court in order to determine the validity of a will and codicil.

The motion is made upon three grounds: first, the improper summing up of the learned judge; secondly, that it was a verdict against the weight of evidence; and thirdly, that only one of the three attesting witnesses has been examined at law. It appears that the two attesting witnesses were present in court at the trial of the issues, and were tendered by the plaintiffs in the issues to the defendant for examination, but that his counsel declined to examine them.

I have carefully read every word of the report of the learned judge, but have purposely abstained from reading the short-hand writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. Considering that this testator throughout the course of a long life had been received in the world as a person capable of legal contracts, and had entered into pecuniary engagements by borrowing money and by purchase and sale of property to a very large amount, and considering the description of witnesses who have been respectively examined on both sides, and the opportunities they repeatedly had of acquiring an accurate knowledge of the state of the testator's understanding, and comparing the nature of the testimony given by the respective witnesses,—I am clearly of opinion that the weight of evidence is in favour of the competence of the testator, and that the jury have come to a sound conclusion on the subject.

As this opinion is formed without any reference to the summing up of the learned judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different conclusion, it is not necessary to take any notice of the observations which have been made in that respect.

The effect of establishing a will in this court is to conclude all future questions respecting its validity; and the caution of this court requires, therefore, before a will be established upon evidence here, that all the attesting witnesses shall be examined. If this court requires the aid of a court of law, and the intervention of a jury, to determine the validity

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of a will, it does not necessarily follow that a court of law must in such a case depart from its own rules and adopt those of a Court of Equity. When all the witnesses are not examined in the court of law, and the cause comes on for further directions in a Court of Equity, there may be cases in which a Court of Equity, referring to its own principles, may not have its conscience fully satisfied by the verdict of the jury:—as, for instance, where the general competence of the testator being admitted, the question depends on the competency at the particular time of executing the will. There the attesting witnesses being the persons who can give the best testimony as to the special fact, it may be reasonable in the Court of Equity to send the case back, in order that all the witnesses may be examined. But when, as in the present case, the question depends not upon the particular state of the testator's mind at the making of the will, but upon his general competency throughout a long life, the attesting witnesses to the will may not be persons capable of speaking to the fact of general competency, and not, therefore, the most material witnesses in the consideration of a Court of Equity.

It is further to be observed, that the bill filed in this case is not by the devisees to establish the testamentary instrument, but it is a bill by the heir at law claiming against these instruments, to have a legal estate put out of his way, in order that he may try the validity of these instruments by ejectment, and no decree in this cause would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage; or even upon the hearing upon further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed by restraining the defendants from opposing to him the legal estates.

It is not, however, for the present purpose, necessary to advert to these distinctions. The complaint that the two other witnesses were not examined, is made by the heir to whom they were tendered, who had full opportunity of examining them, but thought fit to decline that examination. He declined it, because he wished to have the technical advantage, which by the rules of law results from considering those persons witnesses of his opponent. Can he, therefore, with effect say that it must be inferred that the witnesses, if examined, could have given evidence in his favour, when it was his own choice that such evidence should not be laid before the court?

The motion for a new trial must, therefore, be refused.

The plaintiff moved before the Lord Chancellor for a new trial of the issues.

His lordship having been counsel on the trial of the issues, and on the application for a new trial to the Master of the Rolls, requested the assistance of the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron: and the motion was heard before the Lord Chancellor, Lord Chief Justice Tindal, and Lord Lyndhurst.

Sir J. Scarlett and Mr. Armstrong, who supported the motion, and Mr. F. Pollock and Mr. Tomlinson, who opposed it, in commenting upon the nature and effect of the evidence, and the manner in which the case had been left to the jury by the presiding judge, pursued the same general line of argument which had been previously taken at the Rolls: but the third point, which involved the question how far the rule was imperative,

that upon an issue of *devisavit vel non*, all the attesting witnesses should be examined, stood over to a subsequent day, for the purpose of being argued separately by a single counsel on each side.

May 11.—The Solicitor-General, in support of the application, now contended that, both upon general principles and upon the special circumstances of the case, all the attesting witnesses ought to have been examined, and that, inasmuch as the devisees, whose duty it was, as plaintiffs in the issue, to set up the will, had declined to examine them, a new trial must be directed of course, the former having miscarried. The sole object of granting such an issue, was to satisfy the conscience of the court upon a question respecting which, from the imperfect mode of taking evidence in equity, no sound judgment could be formed without resorting to the aid of a court of law. That course, however, would be an idle mockery, if the dexterity of an advocate, or the technical rules of *Nisi Prius* practice were suffered to defeat the ends of justice; and those ends were only to be attained by subjecting to a full and searching *vivâ voce* examination all the individuals whose testimony could throw light upon the points referred to the determination of the jury. The rule, therefore, was imperative and universal, that upon the trial of an issue of *devisavit vel non*, all the subscribing witnesses, if alive and of sound mind, and resident within the jurisdiction, ought to be examined: and no distinction in this respect had ever been suggested between cases where the devisees were plaintiffs in equity seeking to establish the will against the heir, and cases where they were defendants resisting his attempts to impeach it. Bootle *v.* Blundell. 19 Ves. 494; Cooper, 136. In Winchilsea *v.* Wauchope, 3 Russ. 441, where the bill was filed by the heir, and the question turned solely upon the due execution of the will, it was one of the arguments urged in favour of the new trial which was eventually directed, that two only of the attesting witnesses had been called at the former trial. In Lowe *v.* Jolliffe, 1 W. Black. 365, upon an issue out of chancery tried at bar, the examination of all the subscribing witnesses appears to have been required, although the effect of their evidence was strongly to impugn the validity of the instrument which they had themselves attested.

Independently of the general rule, there were circumstances which, in this case, rendered a second trial peculiarly necessary. The issues had not been directed as a mere matter of course, but the judicial attention of the court had been pointedly drawn to them. All the attesting witnesses were examined in equity, and two of them, Messrs. Procter and Tatham, were very fully cross-examined by the plaintiff, the heir at law. The result of their cross-examination went a great way towards showing that the testator was utterly incompetent to make a complicated will like the one in question; and the court would never, in the face of that evidence, and without having the matter sifted to the bottom, declare itself satisfied with the verdict, especially in a case where, in consequence of the outstanding terms, the order dismissing the bill might conclude the parties, and be tantamount to a formal decree establishing the will against all the world. In fact, the result of the trial at law, instead of being more satisfactory than the previous investigation here, was infinitely less so; for the important evidence of two of the attesting witnesses had been purposely withdrawn; and the finding of the jury, therefore, rested mainly on the testimony of the third witness, the only one whom the plaintiffs at law thought it proper or prudent to call; although, as all the

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three equally attested the will, and that instrument constituted the title which the devisees were bound to prove, they were, in truth, the witnesses of the devisees, and it was incumbent upon them, and not upon the heir, to examine them.

Sir E. Sugden, who appeared on the other side, was not called upon to argue the point.

June 11.—Lord Chief Justice Tindal, on behalf of himself and the Lord Chief Baron, read the following judgment:

The application to this court for a new trial of the issue, which was directed in this case, has been made upon two grounds; first, that, by the rule of this court, it was incumbent on the plaintiff, who supported the validity of the will, to call all the subscribing witnesses to the will; and that, inasmuch as he called one only, this court will not be satisfied with a verdict setting up the will; and, secondly, that upon the evidence given in the cause, the verdict for the plaintiff ought not to be satisfactory to the court.

If there is any general rule in this court, that, in all cases, and under all circumstances, the plaintiff in an issue on the question, *devisavit vel non*, has the duty cast upon him of making the three attesting witnesses to the will, his own witnesses upon the trial of the issue, if alive, or in a condition to give evidence, there would be no neccessity for discussing the second ground of the motion; for, in the present case, two of the subscribing witnesses, who were alive and actually present in court under the *subpœna* of the plaintiffs in the issue, were not called as witnesses at the trial.

It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question, *devisavit vel non*, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted, if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the interference of this court, and he ought not to obtain it until he has given every opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the practice is put in the cases of Ogle *v.* Cooke, 1 Ves. sen. 178, and Townsend *v.* Ives, 1 Wils. 216. But it appears clearly from the whole of the reasoning of the Lord Chancellor in the case of Bootle *v.* Blundell, 1 Mer. 193; Cooper, 136, that this rule, as a general rule, applies only to the case of a bill filed to establish the will, (*an establishing bill*, as Lord Eldon calls it in one part of his judgment), and an issue directed by the court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For, in Lowe *v.* Jolliffe, 1 W. Black. 365, where the bill was filed by the devisees under the will,* and an issue, *devisavit vel non*,

* So it appears by reference to the Registrar's book. Reg. Lib. B. 1761. fo. 130.

was tried at bar, it appears from the report of the case that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the reporter says, "to encounter this evidence, the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity;" and, again, the chief justice expressed his opinion to be, that all the defendant's witnesses were grossly and corruptly perjured. And after the trial of this issue the will was established. In such a case, to have compelled the devisee to call these witnesses, would have been to smother the investigation of the truth.

Now, in the present case, the application to this court is not by the devisee seeking to establish the will, but by the heir at law calling upon this court to declare the will void, and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this court to direct that no mortgage or outstanding terms shall be set up against him to prevent his title from being tried at law, but seeks to have a decree in his favour, in substance and effect to set aside the will. This case, therefore, stands upon a ground directly opposed to that upon which the cases above referred to rest. So far from the heir at law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee; and such is the form of his application, that if he fails upon this issue, he would not be bound himself. For the only result of a verdict in favour of the will would be, that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule has been held to apply to such a proceeding; and, certainly, neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court, in directing an issue, is to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule, that such witnesses must be called by one, and such by the other party; but, by subjecting the witnesses to the examination in chief of that party, whose interest it is to call him, from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party, against whom his evidence is expected to make.

In the present case, Mr. Procter and Mr. Edmund Tatham, two of the subscribing witnesses to the will, had been examined in this court, and their depositions were known to both parties. It was well known, that, if called by the devisee, they would state in effect "that the testator was, at the time of signing and publishing the will, of weak mind and deficient understanding, though of good memory; that he was of sufficient mind to make a plain and simple disposition of his property, but not an intricate will like the present."

The real question is, whether these witnesses are to be believed upon this evidence, in contradiction to their own solemn act in the attestation of the will and codicil. That is the problem to be solved. At the time they are put into the witness-box it is known their evidence is in favour of the heir at law, and entirely subversive of the will. What questions, then, can the devisee wish to put to them, other than such as call upon them to explain and account for their solemn attestation of these instruments? And those are questions which can arise upon cross-examination

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alone. He would wish to ask Mr. Procter what could induce him to attest the execution of the will in 1822, and the codicil in 1825, if such was his opinion of the intellect of the testator? Upon what ground he had been the attesting witness to two former wills which had been successively destroyed, and the depositary of the duplicates of each in succession, at the request of the testator, down to the hour of his death? Whether he had not lived in habits of intimacy with Mr. Marsden, and treated him always as a man of understanding and sense? Whether he had not, upon a former occasion, lent money to Mr. Marsden on his bond, and received payment from him, thereby treating him as a man capable of binding himself, and of managing his own affairs? And similar questions would be proposed to Mr. Tatham. It is obvious that if the devisee should be compelled on the trial of this issue to make those witnesses his own, the effect would be to shut out instead of discovering the truth; for after the formal examination in chief to which alone they could be subjected, the heir at law would take care not to ask them a single question.

It is further to be observed, that in the present case there is the less necessity for calling all the subscribing witnesses to the will, as no question arises upon the facts attending the execution of the will, or the compliance with the requisites of the statute of frauds. There is nothing peculiarly within the knowledge of these witnesses, nor any point to which they could be examined, which is not common to the other witnesses called to depose to the state of the testator's understanding. Upon the ground, therefore, that there is no rule in this court which calls upon the devisee to bring forward all the subscribing witnesses to the will, where the heir at law files the bill,—as also upon the ground that, where the subscribing witnesses contradict the effect of their own attestation, it would not be unreasonable to dispense with the rule, even in cases where it is held to apply,—it appears to us that no new trial should be granted on account of Mr. Procter and Mr. Edmund Tatham not having been examined by the devisees on the trial of this issue.

We must consider, therefore, the second and principal ground upon which this application has been rested, viz. that the verdict of the jury, establishing the competency of Mr. Marsden to make this will, ought not to be satisfactory to this court; but that, upon the evidence disclosed at the trial, there is so much room to doubt the propriety of the verdict, that this court ought to submit the question to the investigation of a second jury.

The grounds upon which the validity of the will was contested at the trial, and which have been since relied upon in argument before this court, seem principally two; first, the general incompetency of Mr. Marsden to make any testamentary disposition of his property, or, at all events, such a will as the present; and, secondly, that if Mr. Marsden was not altogether incapable to devise, yet he was of so weak and imbecile a mind as to make him easily subject to fraud and coercion, and that the present will was obtained from him under the effect of fraud or coercion exercised on him by Mr. Wright.

The first of these grounds, it will be readily conceived, is that upon which the decision of this cause must mainly hinge. For, on the one hand, if the jury ought to have found upon the evidence the general incapacity of Mr. Marsden to make a devise, there would have been no need for any other inquiry as to fraud or coercion; on the other hand, if the jury have properly found the general competency or capacity of Mr.

Marsden to devise, such a finding would limit the investigation of the second question to a very narrow point, viz. to the single inquiry, what degree of fraud or what degree of coercion was exercised by the plaintiff upon the mind of the testator? The question would in that case become this: assuming Mr. Marsden to have had generally sufficient understanding to enable him to dispose of his property by will, is there evidence of such fraud or such coercion by Mr. Wright, exercised upon the state of mind, such as it was, of Mr. Marsden, as to render the will in question not the result of Mr. Marsden's free and uncontrolled agency, but in effect the will of Mr. Wright?

And upon this subordinate question, as to the fraud or coercion exercised upon Mr. Marsden, we think, if the general competency of Mr. Marsden to make a will has been properly established, there appears to be no sufficient evidence of actual fraud or coercion on the part of Mr. Wright, either in procuring this particular will and codicil to be made, or in the execution of the same, to call for a new trial, on this ground, as contra-distinguished from the other.

It was the general incapacity of Mr. Marsden to make a will which formed, as might be expected, the principal contention between the parties before the jury, and again upon the argument before this court on the application for a new trial: and whether that question has been properly decided by the jury, is the point which is now to be considered.

On the trial of this cause, for the purpose of proving affirmatively the general incapacity of Mr. Marsden, a very large body of parol evidence was produced by the defendant in the issue, comprising not fewer than sixty-one witnesses in number; some of whom deposed to the state of Mr. Marsden's intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826. And if this evidence had been uncontradicted by testimony of a similar nature, and applying itself to the same points on the part of the plaintiffs, the fair result of the defendant's proof may be taken to have been this,—that Mr. Marsden, from his earliest to his latest years, was a very weak and imbecile man, of singular and capricious habits; that he was by nature extremely timid, and the prey of idle and unmanly fears; that he lived, in particular, in the habitual dread of Mr. Wright, who had obtained a complete dominion over him, and to whom he paid, on all occasions, the strictest and readiest obedience; that his understanding and judgment were far below those of the generality of men; indeed, not exceeding the level of children; and that, according to the language of some of the defendant's witnesses, "he was utterly incapable of managing and conducting his own affairs, and of giving instructions for such a will as that in question, even divested of its technicalities." Such evidence as this, had it not been met by proof of a contrary description, it is unnecessary to say, would have been decisive of the question of incapacity. But, on the part of the plaintiffs, a body of witnesses were produced, large in point of number, though not so numerous as those on the part of the defendant, and whose general testimony is of a nature not only conflicting, but utterly irreconcileable with the proof on the part of the defendant. According to them, Mr. Marsden, the testator, was a man of very retentive memory, and although not of strong mind or of natural talent equal to the generality of men, yet of such understanding and judgment as to be competent to conduct all the ordinary transactions

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of life; and with reference to the immediate question under investigation, in the language of some of those witnesses, "a man perfectly competent to manage his affairs with the assistance of agents and professional men, and to make such a will and codicil as these in question."

Where the question of competency is to be resolved on testimony so adverse and repugnant as the present, (and such repugnance does not consist so much in a contradictory account of single facts, as in the general narrative of transactions extending through the space of a long life), it is useless to argue on each particular fact brought forward on either side, or on the testimony given by each particular witness. The only inference that can be safely drawn, is that which arises from the general effect and tendency of the whole body of proof on each side of the question. The inquiry becomes this,—whether the general mass of evidence tending to establish the weakness and imbecility of the testator's mind, or that which tends to establish his competency, such evidence on each side extending through his long life, is entitled to the preference? And in solving such a question, it must be admitted that, even in this view of the case, it would be extremely difficult to draw a conclusion, from parol evidence so contradictory and conflicting as that in the present case, upon which reliance could be placed with perfect safety. If, however, it were absolutely necessary to decide this question on the judgment and opinion of the witnesses examined on each side as to the capacity of the testator, much would depend on the situation in life and the character of the respective witnesses, on the opportunities they respectively had to form any judgment upon the testator's understanding, and their ability to form a correct judgment; upon the degree of intimacy between the respective witnesses and the testator, the nature of their intercourse, and their habits of life together; upon the period during which their acquaintance continued, and, above all, the comparative closeness with which it is brought down to the time of making the will and codicil; in all which several particulars, if the evidence which has been given on each side should be weighed and balanced together, it is sufficient at present to observe, that there was a greater power and better opportunities of forming a correct judgment as to the testator's capacity on the part of the witnesses called by the plaintiff, than of those called on the other side.

But it appears to us to be unnecessary, on the present occasion, to have recourse to a mode of investigation so difficult. For where the question is left in doubt upon the parol testimony, and the facts of the case will warrant it, it is the safer course to try the question by the evidence of collateral facts which are not involved in the contradiction raised by the parol evidence. Such an appeal, at the same time, resolves directly the question at issue between the parties, and also determines incidentally to which class of witnesses, where they are repugnant and contradictory, the preference is to be given. Such was the rule applied by Lord Redesdale in the case of Towart *v.* Sellers, 5 Dow, 231; and it is obviously a rule founded on sound reason and common sense.

Now in the present case it appears to us there are three distinct classes of evidence which stand clear of the conflicting parol testimony relating to the competency of the testator, the consideration of which, if the facts are established by satisfactory proof, as they appear to us to be, lead directly to the conclusion that the verdict which has been found by the jury is the right verdict. Those heads of evidence are the correspond-

ence between Mr. Marsden and his friends; the various acts done by him in relation to the disposition of his property; and the circumstances attending the preparation and execution of the will itself.

The correspondence of the testator, given in evidence at the trial, consists, first, of letters passing between him and Mr. Greene, who was acting as his solicitor, principally in conducting the purchase of a large property, and the raising money for that purpose, and extending from the year 1787, at different intervals, down to 1804; secondly, of letters passing between Mr. Wright and the testator, upon business and other subjects, in the interval between 1791 and 1814; thirdly, of letters between Mr. Dawson and the testator, being principally letters on the ordinary topics occurring between friends from 1811 to 1819; fourthly, of letters between Mr. Alexander Marsden and the testator from 1811 to 1820, showing the commencement and progress of the acquaintance between those two gentlemen; and, lastly, of two single letters, one in 1797, from Mr. Bickersteth, the surgeon of Mr. Marsden, to that gentleman, containing a request to him to qualify as a commissioner under a road trust, and to give his vote for a Mr. Dobson, a request which was afterwards complied with; the other a letter in 1800 to Mr. Baldwin on the subject of the prosecution of some offenders against the game laws.

The importance of this long and varied correspondence in deciding on the competency of the testator to make his will, is self-evident. If it be the genuine correspondence of Mr. Marsden, no one could hesitate to declare, that the man, who possessed sufficient vigour and energy of mind to carry on this correspondence, must be held to possess a disposing power over his own property. It was indeed so felt by the counsel for the defendant, who admitted, what indeed could not be denied, that if these letters were the genuine letters of the testator, and the acts done by Mr. Marsden as to the disposal of his property were his own acts, there was an end of all question about the will. It is, however, suggested that the letters were written under the tutelage of Mr. Wright or some other person; that they were in reality Wright's letters, and not those of Mr. Marsden; and that the very circumstance of copies being found in Marsden's handwritings of all the letters, both trifling and important, which he wrote to his different correspondents, showed at once the authority of Wright over Marsden, and afforded proof of a deep-laid plan on his part to prepare evidence against the time it should be wanted in support of the validity of any act done by Mr. Marsden in the disposal of his property.

In order, therefore, to ascertain the weight due to these letters, the first question is, whether they are open to the objection above suggested.

The single circumstance of copies having been made by Mr. Marsden of all the letters written by himself, and such copies having been carefully preserved by him, indorsed in his own handwriting, is surely too slender a ground for justifying the conclusion that the letters were written under the control of Mr. Wright. Admitting him to be a man of indolent habits, and averse to business in general, the preserving copies of the letters written by himself is quite as consistent with the supposition that a man with little general occupation, the master of his own time, should have made these copies for his own amusement, or for his future recollection, as with the inference that they were made by the contrivance of Wright.

The first observation, therefore, which arises upon these letters is, the

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absence of any direct proof that Mr. Wright, or any person on his behalf, was concerned in the fabrication of these letters. During so long and so varied a correspondence, if the fact had been so, it might surely have been expected that some evidence would have been furnished of interference on the part of Mr. Wright, either by direct testimony of the fact, or indirectly from the conversations of Mr. Marsden. But there is no evidence to this point of sufficient weight or preciseness to justify any inference of this nature.

In the next place it is to be observed, that, as to all the letters written to Mr. Wright, they must necessarily have been written in his absence, when the writer must have been free from his personal inspection and control. Some were written from Buxton to Mr. Wright when at Wennington Hall: some, from Wennington Hall to Mr. Wright when in London; others, during Mr. Marsden's absence from home at Belle Hill. In none of these letters is there any proof of that degree of incapacity which is imputed to the testator. Mr. Wright could neither have dictated the answers nor compelled Mr. Marsden to keep copies of them. And there is no evidence in the case beyond mere surmise, that, in the absence of Mr. Wright, Mr. Marsden was acting under the control of any other person placed in his stead. With one of the letters Mr. Wright sends him some deeds of exchange, which he directs him to execute in the presence of Mr. Carr of Settle; and he answers in his letter that he has so executed them, as the fact appears to be. Fraud, control, or interference is not to be presumed, but, like any other fact, is to be proved by direct testimony; and there is none such as to these letters written to Mr. Wright.

But, in the third place, there is not one of the correspondents of Mr. Marsden who was not personally well acquainted with him, either before the correspondence commenced or before it was brought to a close. Mr. Greene knew him well, both before and throughout the whole correspondence. Mr. Dawson knew him before the first letter was written, and visited him with his family, in the course of the correspondence. Mr. Alexander Marsden, after the correspondence had commenced, visits him, with his daughter, at Hornby Castle. Mr. Bickersteth and Mr. Baldwin knew him well before their letters were written. All these persons, therefore, were acquainted with the reach and capacity of his mind. But, with this knowledge of the person and character of Mr. Marsden, how can we suppose that the several correspondents could be themselves so far deceived, as to believe letters which were really written by Mr. Wright to have been the productions of Mr. Marsden? We think it therefore the safer inference to draw, that these letters, which were considered by his correspondents, who knew the extent of his capacity, to be his genuine letters, really were so, than, in the absence of any direct testimony, and under the difficulties which would surround such a supposition, to consider them to be letters either composed by Wright, or written under his immediate control.

The next class of collateral evidence is that which comprises acts done by Mr. Marsden relating to the disposal of his own property. Twenty-three deeds were proved to have been executed by Mr. Marsden, in the interval between 1782 and 1819, being various dispositions affecting his real estate. Of these, one was a mortgage to the large amount of 27,000*l.* The charges upon the property of Mr. Marsden were in many instances executed in favour of persons in the immediate neighbourhood, to whom

Mr. Marsden was well known; amongst the rest, one was a mortgage in 1804 to Mr. Edward Tatham, one of the witnesses to his will and codicil. Two of the deeds, above referred to, were transfers of mortgages to the amount of 15,000*l.*, and were executed by Mr. Marsden subsequently to the date of the will. Thirty-five different deeds were produced, which had been executed by other parties to Mr. Marsden, between 1790 and 1824, and conveying property to him. Twenty-one bonds were given in evidence, all executed by Mr. Marsden, to various obligees, being securities to the amount of 16,000*l.* and upwards, between the years 1781 and 1814, all of which had been since paid off, and were then in the hands of his personal representative. Of these bonds, one in 1783 for 400*l.* was given to Mr. Postlethwaite, an attorney at Lancaster, who had been agent to Mr. Marsden; another for 6000*l.*, in 1806, to Mr. Housman, a gentleman in his immediate neighbourhood, who had lived much with him, and on terms of great intimacy. One for 400*l.* in 1814 was given to Mr. Procter, the curate of Hornby, being one other of the witnesses to the will of the testator.

These various acts involve dealings with the testator, by numerous persons, in which a mistake as to his capacity or competency would have been hazardous, and not improbably fatal, to the interests of the contracting parties. They are executed at intervals through a great extent of time, and relate to property of very large amount. The deeds of conveyance, both to and from Mr. Marsden, appear, almost without exception, to have been prepared by attorneys, to whom Mr. Marsden was proved to have been well known, or who were attorneys residing in his immediate neighbourhood. They were attested for the most part by attorneys living in the neighbourhood of Hornby Castle; and so far as appears on the evidence, both the attorneys who prepared the deeds, and the witnesses to them, were men of unimpeachable credit. If Mr. Marsden was really a person in the weak and imbecile state described by the witnesses on the part of the defendant, or if he had been the mere tool or dupe of Mr. Wright, it is very difficult to conceive that such a state of incapacity should be unknown to them, when the mere execution of the deeds before them would of itself have given the opportunity of ascertaining his want of competency. And no reasonable supposition can be framed, that, with the knowledge of such his incapacity to transact business, they could have consented to attest the execution of deeds either to or by him, and thus make shipwreck of their own character and of the interest of their clients, without any visible equivalent. We cannot think the testimony of persons who have merely conversed with him, or met him at table, or on other occasions, and who pronounced him to be incapable, is for a moment to be put in competition with the testimony of persons who have dealt with him, and by thus risking their own interests, furnish undeniable proof of their belief, and the sincerity of their belief, in his competency.

We come now to the third and last ground on which our opinion that there is no necessity for a new trial in this case has been formed, viz. the circumstances under which the will and codicil were prepared and executed. Mr. Bleasdale, the gentleman who was called in as the attorney to make the will, was a person who had retired from the profession of the law, in which he had practised long, and had acquired great experience. He was a person who had known Mr. Marsden when at school, and had kept up a constant acquaintance with him, which had increased

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with their age. He had lived since the year 1816 in Mr. Marsden's neighbourhood, and, for some years before his death, had been accustomed to visit him at Hornby Castle for ten days or a fortnight at a time. He had been first applied to after the death of Mr. Marsden's former attorney, Mr. James Barrow, to make his will anew, (a proof that Mr. Marsden had not been deemed incapable to make a will by a former attorney), and had made for him three several wills before that which is now in dispute; the testator always cancelling his former will, when he made a new one. To the two first wills Mr. Bleasdale himself, Mr. Bickersteth, the surgeon of Mr. Marsden, and the clergyman of Hornby, were the witnesses. To the third will the witnesses were the same as those who have subscribed the will and the codicil which are the subject of this suit.

Mr. Bleasdale received his instructions on all occasions from Mr. Marsden himself, and from no other person; at first receiving verbal instructions, and afterwards written instructions for a codicil, in the handwriting of Mr. Marsden, and a note in his handwriting also, relating to the will itself (which were given in evidence), in pursuance of which instructions Mr. Bleasdale prepared the will. He stated upon his examination, that, on each occasion when he prepared the will, Mr. Marsden explained his intentions and object in a way he could not mistake, and that he framed the will accordingly. He stated further, that he has no doubt Mr. Marsden was fully competent to understand the will and codicil now in dispute.

Supposing, therefore, the testimony of Mr. Bleasdale to have been founded in truth, there is an end of the question. Mr. Bleasdale was a man of skill and experience; he had a thorough knowledge of the testator's capacity. There is no room, therefore, for mistake on his part. If the will prepared by him is not the will of Mr. Marsden, it must be the result of fraud and conspiracy between him and Mr. Wright. Mr. Bleasdale was open to cross-examination, and nothing was produced by it tending to impeach his testimony beyond this, that he was living on terms of intimacy and friendship with Mr. Wright and his family. But fraud and conspiracy, in this case, as in every other, must be proved: it is not enough to surmise or to suspect it; and looking at the testimony relating to the preparation of this will and codicil and the execution of them, we see no proof whatever of any indirect motive or any misconduct on the part of Mr. Bleasdale.

Without, therefore, entering upon an accurate calculation of the relative value of the parol evidence as to the question of the competency of the testator, and looking only to the effect of Mr. Marsden's correspondence with his friends, to his dealings and transactions with other men in the disposition of his property, and to the circumstances attending the preparation and execution of the will and codicil, we see no reason for submitting this issue to a second trial. The cause was tried before a special jury, who appear to have shown great patience and attention in the discharge of their duty. The whole of the evidence was summed up to them by the learned judge, and we think the question was properly left to them in the shape in which he proposed it, as a general question of the capacity of the testator to dispose of his property by will.

Upon the whole, for the reasons above given, we think the verdict which has been found by the jury ought to be satisfactory to this court.

The Lord-Chancellor:—Their lordships have been kind enough to

assist me on this occasion, in consequence of my having not only acted as counsel for the plaintiff on the trial of the issues, but having also argued the question at the Rolls on the application for a new trial.

Upon the first branch of the argument, my mind entirely goes along with the opinion delivered by my Lord Chief Justice,—that, as well on the authorities as on principle, that ground of appeal altogether fails. There is a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee seeking to establish it: the rule which makes it imperative to call all the witnesses to a will must be considered as applicable to the latter only.

With respect to the merits, I did not think I could come to any conclusion with so much impartiality as, however it might satisfy myself, would be satisfactory to the parties; and by their consent, therefore, the consideration and decision of that part of the case,—of the question whether the verdict was right or wrong, and if wrong, whether it was so wrong as to require or justify a new trial,—has been left solely in their lordship's hands. The judgment in point of form is mine, but in substance and effect, it is the judgment of their lordships: and I neither agree nor differ with them, as I have carefully abstained from forming any opinion on the subject.

November 25.—This cause now came on for further directions, and a question was made as to the costs of the suit.

For the defendant it was argued, that the bill ought to be dismissed with costs. Not satisfied with alleging that the testator was not of sound and disposing mind, it brought forward a pretended case of gross fraud and undue influence, most injurious to the character of the defendant Wright; every part of that case had failed: and it had been established by the verdict of a jury, approved of by the judge before whom the issue was tried, and ratified by two judgments of this court, that the will, which the plaintiff sought to impeach, was the deliberate and valid act of a testator of sound and disposing mind. Under such circumstances the plaintiff ought to pay the costs both of the suit and of the issue. This was the more reasonable, as there was nothing to have prevented him from bringing an ejectment, and consequently it was not necessary for him to come into equity, in order to be enabled to try his title. It was, indeed, admitted in the answers, that the legal estate in part of the property was outstanding in mortgagees: but there was no admission that the legal estate in the whole of the property was outstanding. In fact, the legal estate in many of the lands was in the testator at the time of his death: and the plaintiff could have brought ejectment to recover possession of these.

On the other hand, it was insisted, that the evidence in the cause and on the issue showed that the heir had not instituted the suit vexatiously, or introduced into his bill allegations which were not essential to the investigation of the case. How could it be suggested that he had proceeded without justifiable grounds, when even the costs of the appeal on the motion for a new trial were not given against him? It was impossible that he could have tried his title with any safety by an ejectment; for he might have been defeated in twenty successive ejectments by a defence setting up outstanding legal estates. It was admitted that the legal estate in the greater part of the property was in mortgagees: and if

there were some lands, of which the testator had the legal fee in him at the time of his death, what means had the heir of distinguishing these lands from others, the legal fee of which was in third persons?

The Master of the Rolls stated, that it not being clear, by reason of the alleged mortgages, that the plaintiff, the heir, could have proceeded by ejectment, and the nature of the case making it reasonable that the heir at law should have full opportunity to investigate the circumstances under which the will was made, he could not consider the suit vexatious; and he therefore dismissed the bill without costs. But the plaintiff was ordered to pay the costs of the issue.*

Durant *v.* Moore.

2 Rus. & Mylne, 33.

An order that a defendant in contempt for breach of an injunction, shall stand committed, unless cause be shown on a stated day, is not irregular if it be personally served.

November 8, 10, 15.

THE defendant having, in breach of an injunction, removed part of the crops off the lands in his occupation, the plaintiff obtained, and served him with, an order that he should stand committed for the contempt unless cause were shown to the contrary on the first seal before Michaelmas Term.

The solicitor-general (Sir E. Sugden) and Mr. Wakefield now moved that the order for the defendant's commitment might be made absolute. It was the strictly regular course that the order should be taken *nisi* in the first instance. That course was followed in Rudge *v.* Hughes,† where the defendant, after being personally served with the injunction, had proceeded to cut down fruit trees and commit wanton waste in a garden.

Mr. Horne, for the defendant, submitted that the proceedings were irregular. According to the established practice the motion should have been made, upon notice, that the defendant might at once be committed absolutely; and upon the discussion of that application all the circumstances would have been fully brought forward by affidavit. The rule was finally settled in Angerstien *v.* Hunt, 6 Ves. 488, and had never been departed from since. In the unreported case referred to, it appears from the registrar's book‡ that the defendant, who had been committed under an order *nisi* subsequently made absolute, was shortly afterwards set at liberty on the application of the plaintiff himself, who submitted to pay the costs of the proceedings, a circumstance which afforded a fair presumption that those proceedings were considered quite irregular.

* Scaife *v.* Scaife, 4 Rus. 309.

† October 31, 1818, Reg. Lib. B. fol. 1782.

‡ January 25, 1819, Reg. Lib. B. fol. 266.

[Alexander *v.* The Duke of Wellington.—2 Rus. & Mylne. 35.]

November 15.—The Lord Chancellor (Lord Lyndhurst):—The only question to be considered is, whether or not the order *nisi* is a regular course of proceeding when a party has been guilty of a breach of an injunction. It is laid down in the case of Angerstien *v.* Hunt that the order should be for the committal *instanter*, and that there should be no order *nisi* in the first instance. With respect to the authority of Rudge *v.* Hughes, referred to by Mr. Wakefield, although the facts of that case do not very distinctly appear from the statement in the registrar's book, Lord Eldon took time to consider the point. The party was committed under an order *nisi*, and after remaining three months in custody he was liberated at the instance of the plaintiff, who, believing the defendant to have been really innocent in intention, himself agreed to pay the costs. This, therefore, was a case of compassion, to which the plaintiff probably was the more inclined from the circumstance of the defendant being eighty years of age. Upon principle, I think that the order to show cause does not in any way prejudice a defendant; for as he must be personally served, if he has merits, he may, on showing cause, be dismissed. Such an order is not more hard than an order for an immediate committal. On the contrary, it is less so; for it gives the defendant longer time to consider and answer the affidavits made against him by the plaintiff. Upon principle, I think that an order to show cause why a party should not be committed for breach of an injunction may be served personally; and for this I consider the case of Ruge *v.* Hughes to be a conclusive authority. These proceedings, therefore, have been quite regular.

Alexander *v.* The Duke of Wellington.

2 Rus. & Mylne, 35.

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown.

A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the lords of the treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestuis que trusts* compel a distribution under it by a suit in equity against the trustees.

Semble, The crown may at any time before distribution, alter or revoke a grant of military prize.

November 15, 16, 1830. May 26, 27, 1831.

IN the year 1817, the late Marquis of Hastings, who was then Governor-General of India, and who also held the appointment of commander-in-chief of all the forces in the East Indies, as well those of his majesty, as those of the East India Company, commenced hostilities against the Pindarrees, and against several of the Mahratta princes, who were threatening an attack on the British territories. With a view to

[Alexander *v.* The Duke of Wellington.—2 Rus. & Mylne, 35.]

the vigorous prosecution of the campaign, and in order more effectually to co-operate with the rest of the troops engaged in the same service, his lordship took the field in person at the head of a large force belonging to the presidency of Bengal, and known by the name of the Grand Army; but the chief burthen of active war fell upon the forces which were posted in the near vicinity of the hostile states. The forces assembled in that quarter consisted, partly of what formed properly the Deccan division, commanded by Lieutenant-General Sir Thomas Hislop, and partly of brigades and detachments from other divisions and belonging to different presidencies. The whole bore the general appellation of the army of the Deccan, and acted under the orders of Sir T. Hislop in virtue of an appointment as its commander-in-chief. In the following year hostilities terminated in the total defeat and subjugation of the native powers, and a very large quantity of valuable booty, consisting chiefly of stores and treasure, fell into the hands of the conquerors as the fruits of their success. Portions of this booty were acquired by the enterprise of small detachments, who, acting independently of the main army, attacked and plundered individual forts, in some instances after the camp had been broken up and open warfare had ceased. Another and much larger portion was captured by the troops composing the Deccan army, by whom the active operations of the war were principally carried on: but the whole of it, from whatever sources derived, and by whatever parties won, was ultimately thrown, under the general denomination of the Deccan prize, into one common fund, which, being prize taken in war, was admitted to have vested in the crown by force of the prerogative, and to be disposable therefore according to the pleasure of his majesty.

On the 10th of October, 1820, and the 1st of December, 1822, long before any distribution of the booty had taken place, and before even the principles on which a distribution should be regulated had been declared, the Marquis of Hastings, who still continued to fill the offices of Governor-General and Commander-in-chief of the forces in India, executed and gave to Messrs. Alexander & Co. bankers in Calcutta, two several indentures, whereby in consideration of certain advances made to him, and to secure the repayment thereof, he assigned to Alexander & Co. all his expectant share and interest in the Deccan prize money, whatever it might be.

In the mean time it became understood that, in the exercise of the royal bounty, the Deccan prize would be distributed, as had been usual in similar cases, among the officers and men who had been concerned in its acquisition; and his majesty having referred it to the lords' commissioners of the treasury to consider and report upon the mode in which a distribution might be most equitably made, memorials were presented to their lordships on behalf of the East India Company, Lord Hastings, Sir T. Hislop, and others, bringing forward the respective claims of the memorialists upon particular portions of the fund.

The result of their lordship's deliberations was communicated to his majesty in the form of a treasury minute, which bore date the 5th of February, 1823, and of which the following is the material part:—

"My Lords:—Having heard counsel in support of the claims of the Marquis of Hastings and the grand army, and of those of Sir Thomas Hislop and the army of the Deccan, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel,

are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case will admit, to that of actual capture, and although they are aware that the principle of constructive capture must, under certain circumstances in a degree be admitted, the disposition should be to limit rather than to extend that principle. They are therefore of opinion, that the mode of distribution originally intended by the Marquis of Hastings would be most equitable and just with respect to the booty taken at Poonah, Mahidpore, and Nagpore, and that the booty taken on each of these occasions respectively should belong to the divisions of the Deccan army engaged in the respective operations in which the same was captured: but that as the division of the Bengal army under Brigadier-General Hardyman appears to have been put in motion for the purpose of co-operation directly in the reduction of Nagpore; and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my lords to be justly entitled to share in the booty captured at Nagpore; and that such other booty arising from the operations against the Mahrattas, in the years 1817 and 1818, as may now be subject to his majesty's royal disposition, should be granted to such divisions of the grand army under the command of the Marquis of Hastings, and of the Deccan army under the command of Sir Thomas Hislop, as may respectively have captured the same. My lords are also of opinion, that, conformably to the letter of the Marquis of Hastings to Sir Thomas Hislop, of the 12th of January, 1818, Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818. My lords have felt it to be inconsistent with their duty, to recommend to his majesty to give his sanction to any agreement for the common division of booty into which the several divisions of either army may have entered, as it is their decided opinion, that if the principle of actual capture be not adopted in this case, as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution among the forces of all the presidencies engaged in the combined operations of the campaign. My lords do not consider that, under all the circumstances of the case, it will be expedient to recommend to his majesty to grant any part of the booty to the East India Company; and my lords will submit to his majesty their recommendation, that he will be graciously pleased to direct that his royal grant of the said booty may be made in conformity with these principles; and for the purpose of better carrying into effect his majesty's gracious intention in this behalf, my lords will recommend to his majesty, that a grant be made of the said booty to trustees, to be appointed by his majesty, for the purpose of ascertaining and collecting the said booty, and for preparing a scheme for the distribution thereof, conformably to the principles above stated, which my lords will submit for his majesty's final approbation and sanction under his royal sign manual warrant."

This minute was, on the 22d of March 1823, followed by a royal warrant under the sign manual, which, after reciting the circumstances under which the booty had been acquired and had become vested in the crown, set forth the treasury minute at large, and continued in these terms:—"And whereas we have been graciously pleased to approve of the said minute

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and recommendation of our said commissioners: and whereas it is expedient that a warrant under our royal sign manual should be issued for granting the said booty to trustees to be appointed by us, for the purpose of ascertaining, collecting, and receiving the same, and for preparing a scheme of the distribution thereof, conformably to the principles recommended in the said minute: We, taking the premises into our royal consideration, are graciously pleased to give and grant, and do by these presents give and grant," &c. The warrant then proceeded to grant to the Duke of Wellington and Mr. Arbuthnot all the property of which the booty was composed, "in trust for the purpose of collecting, recovering, and receiving all the said booty, or the proceeds or value thereof hereby granted, from the said United Company, their officers or servants, and all and every other person or persons whomsoever, unto or in whose hands, custody, or power, the same, or any part thereof, may have come or may now be and remain;" and after investing the trustees with all the powers necessary for the due execution of their office, it continued in these words:—"And when and so soon as the case will admit, we do authorize and direct our said trustees to prepare a scheme for the distribution of the said booty, and of all and every part or parts thereof, conformably to the principles recommended in the said minute of the commissioners of our treasury, and approved by us, which scheme shall be submitted by them to the said commissioners of our treasury for the signification of our royal pleasure thereon."

When the trustees came afterwards to frame their scheme upon the basis of this warrant, difficulties were experienced in practically applying the principles laid down for their guidance to the actual state of circumstances before them, and considerable delay took place in consequence. Eventually they address a letter to the lords of the treasury, stating to their lordships the various respects in which those principles were, in their opinion, incorrect and inapplicable; and a second minute, founded, in a great measure, on the views taken in the letter of the trustees, was shortly after drawn up and issued from the treasury. It bore date the 16th of January, 1826, and was in these terms:

"My lords, assisted by the trustees of the Deccan booty, by Lord Bexley, and the law officers of the crown, having heard counsel on behalf of the Marquis of Hastings and the grand army, and also on behalf of Sir Thomas Hislop and the army of the Deccan, upon the subjects of discussion relating to the distribution of the Deccan booty, which have arisen out of the difference between the actual circumstances attending the capture of a large proportion of that booty, as stated by the trustees, and those which were assumed at the hearing before their lordships in January, 1823, and having maturely considered the arguments severally stated by the counsel, and also the whole of the documents upon the subject of this booty now before the board, are of opinion—

"First, That with respect to all that portion of the booty now at the disposal of the crown, which is described as having been 'taken in the daily operations of the troops,' the distribution thereof should be made to the actual captors, according to the terms and conditions of the minute of this board of the 5th of February, 1823, and of the warrant of his majesty of the 22d of March following.

"Secondly, That with respect to that part of the booty which consists of the produce of arrears of tribute, rent, or money due to the Peishwah, it appears to my lords to have been acquired by the general result of the

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war, and not by the operations of any particular army or division, and they are of opinion that it ought, therefore, to be distributed in conformity with the alternative stated in their minute of the 5th of February, 1823, as being 'the only correct or equitable rule, if the principle of actual capture cannot be adopted,' viz. amongst the forces of all the presidencies engaged in the combined operations of the campaign.

"Thirdly, With respect to the property captured at Nassuck, my lords are of opinion that the booty recovered at that place cannot be distributed upon the principle of actual capture, and ought, therefore, to be divided amongst the forces of all the presidencies engaged in the combined operations of the campaign.

"Fourthly, With respect to the booty recovered at Poonah, alleged to have been removed thither from the Rai Ghur, my lords are of opinion that this booty cannot be distributed upon the principle of actual capture to the force by which Rai Ghur was taken under the orders of the government of Bombay, unless it can be proved by the captors of Rai Ghur that the property in question was actually in that fort at the time when it was taken, in default of which proof my lords are of opinion that this booty also ought to be distributed among the forces of all the presidencies engaged in the combined operations of the campaign.

"Fifthly, With respect to that portion of the booty which is stated to consist of money recovered on account of deposits made by the Peishwah, my lords are of opinion that any part of this property which can be proved to have been in Poonah at the time when that place was captured, viz. on the 17th of November, 1817, ought to be distributed to the captors of Poonah according to the terms of the minute of the 5th of February, 1823, upon the principle of actual capture; but that with respect to those parts of the above property as to which such proof cannot be established, such moneys or effects must be considered as having been acquired by the general result of the war, and as such ought to be distributed amongst the forces of all the presidencies engaged in the combined operations of the campaign.

"Sixthly, With respect to the share of the commander-in-chief in the distribution under the several heads above enumerated, my lords are of opinion that the Marquis of Hastings ought to share as commander-in-chief in all those cases in which Sir Thomas Hislop is not entitled to share as such under the terms of the minute of the 5th of February, 1823, wherein it is declared, 'That Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, were entitled to participate in the booty which may arise from any capture by any of the divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818.'

"My lords are further of opinion, that the general rules of division hitherto adopted in the distribution of booty to the forces in India, among the several classes and ranks of the army, should be adhered to on the present occasion."

The minute of the 16th of January, 1826, was followed by a warrant under the sign manual, bearing date the 30th of September, 1826. This instrument stated, in its preamble, the warrant of March, 1823, and the consequential grant to the trustees, reciting that such grant was made "in trust, for the purpose of being distributed to the said forces according to a scheme directed by our said warrant, and substituted by the said trus-

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tees to the commissioners of our treasury, for the signification of our royal pleasure thereon." It then proceeded:—"And whereas the said commissioners of our treasury have humbly submitted to us, for our gracious approval, a minute of their board, bearing date the 16th day of January, 1826, containing directions to the said trustees as to the principles on which they were to prepare the scheme for the distribution of the said booty, of which further directions we have been graciously pleased to approve: and whereas the commissioners of our treasury have represented to us that they have maturely considered the schemes prepared in conformity to the said minute submitted to them by the said trustees for the distribution of certain parts of the said booty taken in the daily operations of the troops under the command of Lieutenant-General Sir T. Hislop at the following places; viz." &c. Here the warrant specified the several places where the booty taken was to be considered as falling within that description, and stated the value of the whole at 21 lacs 58,168 rupees, as more particularly set forth in the annexed schemes to which it referred. It then proceeded: "And whereas we are graciously pleased to approve of the said schemes, we do hereby authorize and direct our said trustees to distribute the proceeds of the said 21 lacs 58,168 rupees accordingly."

The warrant for the distribution of those portions of the booty which were to be considered "as having been taken in the daily operations of the troops," and therefore distributable upon the principle of actual capture, was followed, on the 13th of February, 1828, by another warrant relating exclusively to that part of the booty to which the principle of constructive capture was to be applied. This latter warrant referred to, and formally approved of, the treasury minute of January, 1826, in language precisely the same with that employed in the warrant of September, 1826, already set forth; and it continued in these words:—"And whereas the commissioners of our treasury have represented to us that they have maturely considered the scheme prepared in conformity to the said minute, and submitted to them by the said trustees for distribution of a part of the said booty acquired by the general result of the war by the forces under the command of the late most noble the Marquis of Hastings, commander-in-chief of all our forces in India, amounting in all to 41 lacs 39,803 rupees, &c., as shown by the said scheme hereunto annexed, &c.; and whereas we are graciously pleased to approve of the said scheme, we do authorize and direct the said trustees to distribute the proceeds of the said 41 lacs 39,803 rupees accordingly."

The ostensible object of these two instruments was to give the royal sanction and approval to the schemes therein referred to, which were framed in conformity with the principles recommended in the treasury minute of January, 1826. Their practical operation, when taken in connection with those schemes, was to authorize a distribution of the booty, proceeding to a much greater extent upon the principle of constructive capture than seemed to have been contemplated by the warrant of March, 1823. The result was extremely prejudicial to the interests of Sir T. Hislop and the Deccan army, who, under the language of the original warrant, considering themselves the actual captors of the great bulk of the property, had expected to share it exclusively among themselves; and it was proportionably favourable to Lord Hastings and the grand army, who were thus let in to participate in a fund which the Deccan

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army had supposed to be peculiarly its own, and of which the share allotted to Sir T. Hislop became in consequence reduced from that of commander-in-chief to that of a subordinate officer only.

The Marquis of Hastings died in November, 1826, before any distribution of the prize had taken place; and the bill was filed by Messrs. Alexander and Co. for the purpose of establishing their title under the indentures of October, 1820, and December, 1822, to the share accruing to the marquis's estate by virtue of the warrant of February, 1828.

The scheme issued in pursuance of that warrant appeared in the London Gazette of the 11th of March, 1828, and was entitled "Grant to the combined army which served under the command of the late most noble Francis Marquis of Hastings, K.G., commander-in-chief of all the forces in India, engaged in the war against the Pindarrees and certain of the Mahratta states, in the years 1817 and 1818." This scheme had ascertained the value of the share allotted to the commander-in-chief of what was there denominated "the combined army," at the sum of 44,201*l.*, being one-eighth of the whole fund thereby apportioned among the officers and men who composed that army; and as the description of commander-in-chief was understood to apply to Lord Hastings, although his name was not mentioned in the body of the scheme, the sum so allotted was paid into court in the cause of Watson *v.* Duke of Wellington, 1 Russ. & M. 602, by the trustees of the Deccan booty, and on the dismissal of that suit, was directed to be retained to abide the result of the present claim.

Sir T. Hislop, who denied the validity of Lord Hastings's title, and various incumbrancers who set up claims against the fund under instruments posterior in date to the assignments to Alexander and Co., were joined with the marquis's personal representative as defendants to the bill.

Of the questions argued at the hearing, the most material were the two following: First, whether the share of the Marquis of Hastings would pass by the assignment executed by him, after the booty had been taken, but before the crown had made any grant of it, or issued any warrant under the sign manual determining in what mode it should be distributed: Secondly, whether the amount of the share of the Marquis of Hastings was to be considered as definitively fixed by the warrant of 1828, or whether it was still open to any party to claim to have it reduced, according to the principle of distribution alleged to be established by the warrant of 1823.

Mr. Pemberton, Mr. Kindersley and Mr. Fane for the plaintiffs:

Captors have from the time of capture an inchoate right in effects captured as prize, which, though the title is not perfected till a grant is made by the crown, is a vested right and is capable of transmission by assignment or otherwise. In Stevens *v.* Bagwell, 15 Ves. 152, Sir William Grant says, "though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. * * * * * * The intention of the crown in all cases of this kind is to put what is, in strictness, matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward; and, though the party performing it died before payment, the claim of bounty from the crown is considered as transmissible to his representatives, in the same plight and condition

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as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the crown never means to exercise any kind of judgment or selection, with regard to the persons to be ultimately benefited by the gift. The representatives, to whom the crown gives, are those who legally sustain that character: but the gift is made in augmentation of the state, not by way of personal bounty to them. They take subject to the same trusts, upon which they would have taken wages or prize money, to which the party from whom they claim might have been legally entitled." There is no authority or principle on which it could be held, that the interest which the captor has in prize-money is not capable of assignment till the grant by the crown is completed.

The amount of the Marquis of Hastings's share is definitively fixed by the warrant and scheme of 1828, and no court can now enter into the consideration of the question, whether a greater or less sum ought to have been allotted to him. As no proclamation has been issued regulating the distribution of such booty as might be taken in the war, the division could be only in such manner as his majesty by his sign manual should direct.*

Sir Charles Wetherell and Mr. Stuart, for Sir Thomas Hislop, contended, at great length, that the fund was bound by the warrant of 1823, which established the principle by which the distribution of the booty was to be made, and that the distribution directed by the warrant of 1828 was not in conformity to this principle.

Mr. Bickersteth and Mr. Griffith Richards, for the personal representative of the Marquis of Hastings.

The Marquis of Hastings had not, at the time when the security to Alexander and Co. was executed, such an interest in the booty, as was capable of assignment. In Stevens *v.* Bagwell, prize-money is placed on

* The 54 G. 3. c. 86, s. 2. provides, "That in all captures which shall be made by his Majesty's army, royal artillery, provincial, black, and all other troops in the pay of his Majesty, or belonging to his Majesty, but in the pay of the united company of merchants trading to the East Indies, whether in conjunct expeditions with his Majesty's navy, or otherwise, of any fortress or possession of his Majesty's enemies upon the land, or of any ship or vessel in any road, haven, river, or creek belonging to such fortress or possession, the commanders and other officers and soldiers acting on such expeditions shall have such right and interest as his Majesty shall think fit to order and direct, in all the arms, ammunition, stores of war, goods, merchandise, and treasure belonging to the state, or to any public trading company of such enemies, which shall be found in such fortress or possession; and also in all and every ship or vessel, with their arms, ammunition, tackle, apparel and furniture, and all the goods, merchandise and other effects on board the same, which shall be captured in any road, haven, river or creek belonging to such fortress or possession, after final adjudication thereof, as lawful prize to his Majesty, in any of his Majesty's Courts of Admiralty or Vice-Admiralty, which shall be duly authorized to take cognizance of the name (which courts are hereby required to proceed therein to lawful adjudication), to be divided in such proportions, and according to such general rule of distribution for the army as shall be established by his Majesty, or in default thereof in such manner as his Majesty shall, under his sign manual, be pleased to direct." The 54 G. 3. c. 86, has since been repealed by the 2 W. 4. c. 53, which amends and consolidates the laws relating to the payment of army prize-money.

the same footing as wages. Collyer *v.* Fallon, T. & R. 459. It is settled that neither the full pay nor the half pay of an officer can be assigned or pledged. Berwick *v.* Read, 1 H. Black, 627; Flarty *v.* Odlum, 3 T. R. 651. Considered as a remuneration for past services, prize-money cannot be assigned; and if it is viewed as an excitement to future exertion, the same objection applies. The country has a right to require, that the officers and soldiers shall not place themselves in a situation, in which the motives, held out to them by the crown, shall be impaired in force. In the present case, there is a peculiar disability arising out of the situation of the Marquis of Hastings as governor-general. The man who was governor-general and commander-in-chief, was necessarily the person who would be principally consulted by the crown as to the mode of distribution which should be adopted: and in the present instance, communications on this subject did take place between the Marquis of Hastings and the officers of the crown. He would be exposed to temptation not to discharge his duty in such communications, if he were permitted previously to subject his own share in the booty to the demands of others.

Mr. Wray for the crown.

Mr. Spence, Mr. J. Russell, and Mr. Wright for other parties.

Mr. Pemberton, in reply:

Prize-money is not in the nature of full pay or half pay. A soldier cannot assign his pay, because his pay is received for the purpose of enabling him to discharge the duties which he is hired to perform, and the probable result of alienating his pay would be to deprive him of the means of performing his duties. Prize-money, on the contrary, is an extraordinary bounty granted by the crown as a reward for services already performed. The services having been performed, it matters not how the reward is dealt with by the party entitled to receive it; and whether it is assigned before or after the nominal grant by the crown must be altogether immaterial. Even considered as a stimulus to future exertion, it is not likely to act the less powerfully, because it has been appropriated to the payment of debts previously contracted.

If the distribution directed by the warrant of 1828 were at variance with the warrant of 1823, and the principle established by it, we might still argue, with much confidence, that the crown was at liberty, at any time before a scheme of distribution was finally settled, to alter the mode of distribution as to his majesty might seem fit. In truth, however, the warrant of 1823 has not the effect which is attributed to it by Sir Thomas Hislop. It is merely a grant of the booty to trustees, upon trust to collect the property; with a direction that they shall prepare a scheme of distribution, conformable to a certain principle laid down in a treasury minute, and submit that scheme to his majesty for approbation. The trustees frame their scheme upon the principle stated in the treasury minute; but, upon fuller examination with respect to some parts of the booty, the facts were discovered not to be such as they had been assumed to be, when the matter was before the lords of the treasury. And, it was in consequence of this alteration in the state of circumstances, that the principle of actual capture ceased to be applicable to certain portions of the booty, to which it had been previously supposed to apply. The lords of the treasury being informed of the facts as they really were, came to certain resolutions, which do not alter the principle established by the warrant of 1823, but are merely instructions to the trustees for the

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application of this principle. A scheme is accordingly prepared by the trustees, and approved by the crown; and a warrant for the distribution of the property, in conformity to that scheme, is issued under the sign manual.

The Master of the Rolls held, that prize money was not in the nature of military pay, and was assignable in equity.

He also held that the rights to the property comprised in the distribution made by the warrant of 1828, could be determined by that warrant alone, and that no claim to any part of that property could be sustained by Sir Thomas Hislop under the warrant of 1823.

May 26, 27, 1831.—Sir T. Hislop appealed from the whole decree.

The Lord Chancellor having called on the appellant's counsel to begin, Sir C. Wetherell, Mr. Knight, and Mr. Stuart, contended that the warrant of March, 1823, amounted to a final and indefeasible grant of the prize to trustees, for the benefit of a class therein distinctly indicated by description. Conformably to the principles laid down in the instrument for the guidance of the trustees, and from which they had no discretion or authority to deviate, and applying those principles strictly to the actual circumstances under which the booty in question was captured, the troops composing the army of the Deccan, under the command of Sir T. Hislop, were the persons exclusively answering the description. The individuals who were to take being thus ascertained, the trustees were merely empowered to act in a ministerial capacity, for the purpose of getting in the prize, and computing the value of each claimant's share according to his rank; and they were therefore to prepare a scheme, specifying in detail the exact amount of the several shares. The warrant was, therefore, in effect, a trust deed, vesting in Sir T. Hislop and the forces under his command, a definite and absolute interest in the fund; such an interest as entitled them to call upon the trustees to proceed in the execution of their trust, and to bring them judicially to account, if they afterwards attempted to remould or evade it. It was no defence to the trustees to say, that the crown had issued two other warrants, of later date, in terms which virtually rescinded or revoked the first; for the property had been completely and irrevocably devested out of the crown by the original grant, and could not be resumed at pleasure by any subsequent act of his majesty, and the warrants of 1826 and 1828, therefore, were altogether nullities.

If the right were admitted to have been fully vested in Sir T. Hislop, the jurisdiction of the court to adjudicate upon the warrant followed of course. There was no rule which laid it down, that when a royal grant once created a title, the validity of that title, and consequently the construction of the instrument creating it, might not, like any other matter, become the subject of litigation in Westminster Hall. Here, independently of the ground of trust before referred to, the fund which formed the subject matter of the grant having been brought into the Court of Chancery, the question of title to the fund, and, of necessity, the construction of the warrant, became collaterally, but regularly, cognizable in the same court. Stevens *v.* Bagwell, 15 Ves. 139.

The Lord Chancellor:—From the magnitude of the stake involved in it, this appeal is entitled to be termed very important; and it is also extremely important in another view, from the deep interest which many

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most meritorious individuals must necessarily take in the result. But here its whole interest ends; for if, on the one hand, I never saw a more important case, so, on the other, I have never, in the course of my experience at the bar, seen one less encumbered with any kind of difficulty.

I shall begin with stating principles touching the uncontested rights of the crown in matter of prize; principles which have a material influence over the whole question, but which, however they may have been admitted in point of form, have been altogether lost sight of in their application to the argument. That prize is clearly and distinctly the property of the crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the state, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the crown possesses this property *pleno jure*, absolutely and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize, must needs in all cases be the act of the crown, by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the crown was minded to depart with the property finally and irrevocably—whether, even in that case, the same paramount and transcendent power of the crown might not enure to the effect of preserving to his majesty, the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this at all events is clear; that when the crown by an act of grace and bounty, departs, for certain purposes and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the crown, as it was before the act was done.

This latter proposition is capable of illustration from a variety of sources, which were but slightly adverted to in the argument; for whether we refer to the decisions of venerable judges, to the precedents furnished by prize proclamations, or to the more venerable authority of the letter of the statutes, from all of these it will be found that, in stating the absolute nature of the principle, I have not strained, but have rather fallen short of the truth.

The doctrine has been frequently recognized in cases where the question has arisen subsequently to the capture, and before condemnation: but the same principle was afterwards extended in the case of the Elsebe Maas, 5 Rob. 173, at the Cockpit, in which, after final adjudication in the court below, but pending an appeal, and before the final decision of the appeal, the crown thought proper, for reasons of state and public policy, to restore the prize at the expense of the captors. In other words, it was there determined, and that too upon a solemn and most able argument, and by a judge the most learned and eminent of his time, the present Lord Stowell, that when the crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further

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costs of proceeding in the admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy. "It is admitted," says Lord Stowell, in language which it would be vain to praise or attempt to imitate, "it is admitted on the part of the captors whose interests have been argued with great force, (and not the less effective, surely, for the extreme decorum with which that force has been tempered) that their claim rests wholly on the order of council, the proclamation, and the prize act. It is not, as it cannot be denied that, independent of these instruments, the whole subject matter is in the hands of the crown, as well in point of interest as in point of authority. Prize is altogether a creature of the crown. No man has, or can have, any interest, but what he takes as the mere gift of the crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the crown. The acquisitions of war belong to the crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution: it is universally received as a necessary principle of public jurisprudence by all writers on the subject, '*Bello parta cedunt reipublicæ*,'" 5 Rob. 181. Upon that principle, accordingly, and holding that right not to be devested by the proclamation, and order in council, and the prize act, Lord Stowell, decided that, up to the period of final adjudication, the crown can restore the prize, without thinking of consulting or taking the consent of the captor, who, at his peril, and at the expense of his own blood and treasure, won that prize from the enemy.

It has been strongly argued that the difference between prize proclamations and the warrant in question is this, that the prize proclamations only intimate the intention to distribute or to grant, whereas here there is much more—a grant actually executed. The prize proclamation, which was the subject of discussion in the case of the Elsebe Maas, now lies before me, and it will presently be seen whether or not that can, with any strictness of speech, be described as an intention indicated, and not a grant made. It is a solemn instrument—a proclamation by the king; and it runs in these terms:—"We, being desirous to make it known to our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice and consent of our privy council,"—not that we intend to do this or that, but—"that our will and pleasure is, that the net proceeds of all prize taken, the right whereof is inherent in us and our crown, be granted to the takers, subject to the payment of costs and not otherwise, and the same prize may be so granted in the proportions and manner hereafter set forth, that is to say;"—and then comes the scheme of distribution, according to which the crown's will and pleasure is, that the prize shall vest and be distributed.

Throughout the whole of the instrument I find not a letter or a syllable that looks like the reservation of a power to alter or revoke. Here is a gift by the crown, of a right inherent in the crown, to be distributed among the captors according to a scheme laid down "herein," and not elsewhere, to be distributed as "hereafter set forth" and not otherwise, and without a title that points to the reserving of a power to revoke, or alter, or modify that scheme. Now I have said that the higher authority of the act, if higher it be, shall fix the construction to this instrument, and shall show what is the power of the crown, even after it has

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issued the prize proclamation, after it has finally approved the scheme of distribution, and finally stated in what way the distribution was to be effected. It might have been argued from that proclamation, much more strongly than from the warrant under consideration, that the grant was irrevocably vested, and that the gift must be held as upon a conveyance in trust, subject to the direction of the court and the pleasure of the *cestuis que trusts*. That proclamation looks forward to no other act upon which final distribution is to attach. It does not say in the language of the present warrant, "to be distributed in such way, or according to such scheme as our lords commissioners shall lay before us, and as we shall approve of." Observe, nevertheless, how the legislature has treated this very instrument in the prize act; and surely, if any statute be germain to the matter in hand, it must be the one passed by the authority of the legislature at the beginning of each war, to regulate the rights of parties. No prize act ever presumes to interfere with the rights of the crown. No prize act ever assumes that the legislature is dealing with the rights of the crown, but suggesting and prefixing a statement, that the crown had given the net proceeds to be dealt with, in terms like the following,—"Whereas his majesty hath, of his royal munificence, been graciously pleased, by several proclamations, to declare his will and pleasure to give the benefit of all prize taken during the hostilities in which his majesty is engaged, to the captors thereof, being in his majesty's service, or duly commissioned,"—it then proceeds to declare, adopting and confirming the proclamation, "that the captures be decided and distributed in such manner as his majesty hath been pleased to order by the said proclamation of the 7th of July, 1803." But it does not stop there, as, had the grant been irrevocable and unchangeable, it would have done;—"or, in such manner as his majesty, his heirs and successors, may order and direct by any proclamation now or hereafter to be issued." Can any person who reads that statute doubt, that notwithstanding the words of gift used by the crown, notwithstanding the absolute and irrevocable nature of those words in the prize proclamation, the legislature did look forward to a future period, when the crown might thereafter recal and change the mode of distribution altogether?

Here, then, is a legislative declaration, (for the statute is declaratory merely, and enacts no new law upon the subject,) and although the prize proclamation appears to make a distribution according to a scheme, without looking forward to any further approbation or alteration, the crown has still the power to alter that scheme and substitute another, to vary and revoke it, to make a new distribution upon principles wholly different.

Thus much with respect to prize at sea. In general, no act passes with respect to military prize; nevertheless, that rests upon the same principles of law. The 54 G. 3. c. 86, proceeds accordingly in these terms:—"Whereas his majesty hath, of his royal munificence, been graciously, pleased by several proclamations, to declare his will and pleasure to give the benefit of all prizes taken during the hostilities in which his majesty is engaged, to the captors thereof, being in his majesty's service, or duly commissioned," &c.; and the second section provides, that all captures shall be divided in such proportions, and according to such general rule of distribution for the army, as shall be established by his majesty, or in default thereof, in such manner as his majesty shall, under his sign manual be pleased to direct; notwithstanding the preamble had recited

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that his majesty had issued his proclamation, stating the mode of distribution that was to be adopted.

I come now to the warrant which lies before me for construction in the present case. It is admitted upon all hands, whether the lords of the treasury were right or wrong in the conclusion they first came to, whether the second conclusion they came to is right or wrong, and whether the first was the same with the second, or the second altered or repealed the first, and substituted a new one, that these are no questions here. The only question raised now, and the only question which a court of law can entertain, is this, whether any thing was done by the crown in the first warrant, which, though a less formal instrument than the proclamation of prize I have referred to, is in substance a proclamation,—whether this warrant, under the royal sign manual, affords any foundation for the contention so ably and explicitly maintained, that the crown departed with the property and vested a right in trustees for the benefit of parties in the nature of *cestuis que trusts*, a right which, though springing from a voluntary act of grace and bounty in the giver, became irrevocably vested in the trustees for those parties, and rendered the subsequent orders immaterial, inasmuch as they were superfluous and contradictory to each other.

First, I greatly doubt the propriety of calling this a trust deed, in any sense of the word. It is more like a power of attorney, given without an interest, and therefore revocable; or rather, perhaps, it resembles some of those arrangements, which are said to be of a family nature, for the payment of debts, and in which the principal object is not so much the creditor as the debtor, the maker of the instrument; and in this point of view the case becomes more nearly analogous to Wallwyn *v.* Coutts, 3 Mer. 707; and Garrard *v.* Lauderdale, 3 Sim. 1, than to the cases of Ellison *v.* Ellison, 6 Ves. 656, Colman *v.* Sarrel, 1 Ves. jun. 50, and Pulvertoft *v* Pulvertoft, 18 Ves. 84; there being rather an agency created for the convenience of the grantor of the deed, than any interest conveyed to trustees for the benefit of those who may become beneficially entitled under it. But, without pursuing this inquiry, let us look at the nature of the instrument itself. After reciting the minute of the treasury, and that "it is expedient that a warrant should be issued, to grant the said booty to trustees, to be named by us for the purpose of ascertaining, collecting, and receiving the same,"—not for distributing to A., B., and C., the persons beneficially interested—no, but "for the purpose of preparing a scheme for the distribution thereof, conformably to the principles recommended in the said minute; We, taking the premises into our royal consideration, are graciously pleased to give and grant the same to our trustees, for the purpose of collecting, recovering, and receiving the booty." The warrant then proceeds: "and also all moneys into which the plunder or booty or any part thereof may have been converted, as well all such as may already have been secured or received into the hands of the United Company, or any of their officers or servants, or any other persons; as also all such as the trustees may hereafter recover or receive from the United Company, or any of their officers or servants, or any other person whomsoever;" and there it ends. The preamble says, "Whereas it is expedient to appoint trustees for the double purpose of collecting in the money, and for preparing a scheme for the distribution thereof;" the operative part says, "you, the trustees, are hereby vested with the booty, for the purpose of collecting and getting it in," without

stating any other purpose. That is totally unlike vesting an interest in them for the purpose of distribution. What follows? Simply a direction or power. The words are, "We do hereby empower the said trustees, under the authority, and by the direction of the commissioners of our treasury, to sue for and recover all such booty; and we authorize and empower our said trustees to allow all proper costs and charges; and we do authorize and direct our trustees to prepare a scheme for the distribution of the booty, and of all and every part and parts thereof, conformably to the principle recommended by the minute of the commissioners of the treasury, and approved by us, which scheme shall be submitted by them to the commissioners of our treasury"—to be acted upon by them without more ado? No such thing—"which scheme shall be submitted by them to the said commissioners of our treasury, *for the signification of our royal pleasure thereon.*"

Suppose a man were to say, I make you trustees for distributing 1000*l.* among A., B., and C.; it might be contended that A., B., and C. were *cestuis que trusts*, and that the trustees were answerable to them. But suppose, he says, I make you trustees touching certain of my debts, and after you shall have called them in, you are to lay before me a scheme, which, when I have approved of, you shall then distribute the funds to A., B., and C., or somebody else. Can any one doubt that this would defeat the claim of A., B., and C.? Till I have seen the scheme, and exercised my discretion upon it, and issued what new directions I please, it cannot be said to vest a beneficial interest in the *cestuis que trusts.* All that this deed effects is, to appoint these persons "our trustees," (not trustees for the parties,) to collect the fund; and it desires them, in a manner merely directory, to lay a scheme for the distribution before the crown. Now, no such step was taken till the years 1825 and 1826, when a scheme was laid before the crown, and his majesty thereupon issued a new warrant, referring to the former, and saying in effect, "I have had a scheme laid before me, and I approve of it." It seems to me, therefore, to be as plain as a matter of fact can be, that the crown in 1826 executed the intention which it professed in 1823, and that it then for the first time approved of a scheme of distribution. Then for the first time it made a final distribution, if up to this hour the distribution be final, a point as to which, upon the authority of the statute construing the prize proclamation, and treating it, though it makes no reference to the future, as if it were still subject to the power and revision of the crown, I am inclined to entertain doubt. It is said that the trustees were only called upon to make distribution according to the principles chalked out by the minute of the treasury, and that they were to act merely as calculators. But it seems a most extravagant supposition, and most derogatory to the dignity of the royal functions, that a mere arithmetical operation should be all that was committed to the trustees, and yet that the crown should reserve to itself the power of approving of this arithmetical operation. The trustees are to submit a scheme framed according to certain principles; but where would be the use of coming back with the result of an arithmetical computation which the lords of the treasury were to lay before the crown? Was it necessary to put all this machinery in motion—to apply to the treasury, and from the treasury to the crown, in order that the latter might adopt a result founded on a simple principle of arithmetic? I cannot so read or understand the warrant without doing violence to all sound principles of construction.

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Reference has been made to the case of Stevens *v.* Bagwell, 15 Ves. 139, where that which was a matter of bounty is put upon the footing of a right. So far to be sure as the question regards the transmission of the right from the grantee, after it has once vested in him, he may sell or assign the bounty; he may transmit it to his heir, or sue for it, and say it has become a matter of right, and is no longer bounty. But is there a shadow of pretence for asserting that, as against the crown, or against trustees standing in the place of the crown, prize is a matter of right and not of bounty? Such a decision will be sought for in vain. The only question, and I doubt whether in a matter so purely the creature of the crown it be a question, is, whether, inasmuch as the arrangement is revocable up to the last moment, the crown could constitutionally render it irrevocable. But here I can have no doubt; for the instrument, instead of making the grant irrevocable, takes express pains to show it to be revocable; if indeed the property be granted at all; which it is not, for the warrant is only an instruction to lay a scheme before the crown, and after that has been approved, to proceed to invest and distribute.

Upon these grounds, I entertain no doubt whatever that this question, upon the merits, is wholly beyond the jurisdiction of the court. Whether the lords of the treasury came to a rightful decision in 1823, or to a more rightful decision in 1826,—whether the crown has erroneously or properly, correctly or incorrectly, justly or unjustly, (using the word in a vague sense, for justice is a term improperly applied to an act of mere grace,) come to a decision upon the advice tendered by the lords of the treasury, is no question for this place. It is enough for this court, and for the court below, that the crown has given the booty by the instruments before me, and that, notwithstanding any thing that had been, or had begun to be, granted three years before, the crown had a right so to give it.

It is said that there is great confusion here; that the decision giving the property to Lord Hastings, as commander-in-chief, professes to proceed upon one principle, and that the former decision, giving it to Sir Thomas Hislop, under the name of commander-in-chief, proceeds upon another principle. But all such considerations are met by observing, that they are useless and foreign to the question in hand, unless they raise some doubt upon the construction of the instrument. Those who so argue do not pretend to say that this instrument is not plain. It is too plain and too strong for them. Their argument is, that the prize was once given to Sir Thomas Hislop, and now to Lord Hastings,—once to Sir T. Hislop by one royal warrant, and now to Lord Hastings by another, which latter, they contend, affects most inconsistently to proceed upon a recognition of the former. But suppose the first instrument had said, "the actual captors shall have the booty," and the second instrument had said, "whereas it is right to adhere to the first instrument, and that the actual captors should have the booty, and whereas Sir T. Hislop is the actual captor, nevertheless we please to give it, not to the actual captor, but to Lord Hastings, the constructive captor;" that would be much stronger than the present case: nevertheless, if it be clear in the operative part of the grant, whatever the reasons in the recital may be, that the crown meant to dispose of the property by the last grant, the crown had the power so to do, notwithstanding this inchoate proceeding, be it inconsistent, be it self-contradictory, or repugnant to the other. If, therefore, it be clear that the crown so intended, the crown had the

right; and the crown having the right, and having exercised it, the appellant can have no title to raise the question here, whether the crown acted well, or was well and wisely advised in bestowing the bounty upon others.

Adamson *v.* Evitt.

2 *Rus. & Mylne*, 66.

Where the grantee of an annuity is induced by false representations or improper concealment of facts, on the part of the grantor or his agent, to become the purchaser of an annuity, although he may have relief at law, a Court of Equity has concurrent jurisdiction.

The grantor and his agent in such transactions are not bound to disclose all the circumstances of the grantor's situation; they are, however, bound to give honest answers to questions put to them.

November 15, 22, 1830.

THE plaintiff was an auctioneer, who for the price of 700*l.* had purchased from Lea an annuity of 85*l.* a year for three lives, on the personal security of Lea and two sureties; the defendants were the solicitors who had conducted the negotiation, and completed the transaction. The annuity was paid during three years; but no more payments were made on account of it; and the grantor and his sureties were insolvent, so that it was now of no value. The bill charged that the defendants had concealed from the plaintiff facts which it was their duty to have disclosed to him, and had misrepresented to him the circumstances of Lea and the sureties; and it prayed that it might be declared that they had by these means fraudulently induced him to become the purchaser of the annuity, and that they might be made answerable for the loss which he had thereby sustained.

Lea was a clerk in the service of the East India Company, at a fixed salary of 800*l.* a year, and he received an additional 100*l.* a year as clerk to one of the committees. In 1819, being indebted to nearly the amount of 1300*l.*, he applied to the defendants to undertake the arrangement of his affairs. To provide a fund for the payment of his debts he assigned to three trustees, of whom Evitt was one, 400*l.* a year out of his salary, and the lease of his house, and executed a warrant of attorney to enter up judgment against him for 2000*l.* Shortly afterwards it was determined to raise a sum of 700*l.* by way of annuity, and Evitt proposed the security to Adamson, for whom, though he was not his regular solicitor, he had in the course of twenty years been concerned in money transactions three or four times. The annuity was to be at the rate of twelve per cent, and the security was to be the personal security of Lea and two sureties. At one time Evitt had agreed to be one of the sureties, if two others could not be found; but other sureties were found, one of whom was a purser in the service of the East India Company, with an income of between 300*l.* and 400*l.* a year, and the other was a clerk in the war office, at a yearly salary of 300*l.* The defendants with the

[Adamson *v.* Evitt.—2 Rus. & Mylne, 66.]

consent of the plaintiff, prepared the securities; he paid to them the 700*l.*, and they placed it to the credit of Lea's account, on which there was at that time, and previous to the receipt of this sum, a balance of 150*l.* in Lea's favour. On the other hand, they, as indorsers of a bill for his accommodation, were under a liability for him to an amount of about 200*l.* In the three following years the account was turned against Lea; and a balance of several hundred pounds became due from him to the defendants.

Mr. Bickersteth and Mr. Roupell, for the plaintiff:

It is clear that, at the time of the purchase of the annuity, Lea was entirely insolvent, and that the plaintiff never would have advanced his money on the personal security of an individual in such circumstances. The situation of Lea was well known to Evitt, and it was his duty to have communicated to the plaintiff every thing which it was fit the plaintiff should know, with a view to his guidance in the transaction. No professional man, except Evitt and his partner, was concerned in the matter. They must therefore have acted as the solicitors and agents of both parties: and, as the solicitors of the plaintiff, they prepared the deeds, and entered up the judgment. The liability under which they at that time were for Lea, gave them a direct interest in inducing Adamson to advance his money. If the latter had been aware of that circumstance, it would probably have deterred him from trusting Lea, and he would, at least, not have placed unlimited confidence in the defendants as his agents, had he been aware that they had an interest adverse to his own.

Evitt must have represented to Adamson that Lea was a solvent man, and that his personal obligation was a good security. The offer to be himself one of the sureties for the payment of the annuity is in itself a representation that Lea might safely be trusted, and shows that, in the negotiation, the defendants must have held out Lea as a man of solvent circumstances. It is admitted that they stated he had a salary of about 1000*l.* a year: in fact, his salary was only 900*l.* a year, of which 400*l.* had been assigned, so that his disposable income could not be more than 500*l.* a year.

Thus, by the fraudulent concealment of facts, which ought to have been communicated to the plaintiff, and by fraudulent misrepresentations of the pecuniary circumstances of Lea, the defendants induced the plaintiff to become the purchaser of an annuity, which now turns out to be of no value, and to pay to them, as a consideration for it, a sum of 700*l.* They are bound in a Court of Equity to make good the loss which their fraud has occasioned.

Mr. Pemberton and Mr. Wakefield, *contra:*

The plaintiff, who has long been engaged in an extensive business, trusted his own judgment in this matter: he did not require the assistance of an attorney to advise him as to the prudence or imprudence of lending money on the proposed security: and the single circumstance of his allowing the deeds to be prepared by Evitt and his partner, will not make them his agents in negotiating and concluding the terms of the contract. He was to get an annuity during three lives, and the life of the survivor, at the rate of twelve per cent, and he was to have the security of three persons: and, for so extravagant a rate of profit, he was willing to run some hazard. Concealment and misrepresentation are posi-

tively denied; and there is no evidence to contradict the answer. The representation that Lea had a salary of about 1000*l.* a year, was sufficiently accurate; and of what importance is it, that he, at that time, owed debts to the amount of about 1300*l.*? The plaintiff never could have supposed that he was dealing with a person in unembarrassed circumstances: for what man, except under the pressure of extreme pecuniary difficulties, would have consented to grant an annuity of 85*l.* a year for so small a sum as 700*l.*?

But even if the defendants have been guilty of concealment or misrepresentation, what right has a plaintiff to come into a Court of Equity? His case, according to his own statement, is, that the defendants, acting as his solicitors, have fraudulently procured him to advance money on a bad security; why then does he not bring an action at law against them? The alleged wrong of which he complains, is a legal wrong; and a judgment at law, if he be right on the merits, would give him the relief he asks.

Mr. Bickersteth, in reply:

The wrong of which we complain, is a loss occasioned by fraud; and that fraud was the fraud of our agent. In respect, therefore, both of the fraud, and the confidential relation subsisting between those who practised the fraud and him who suffered by it, a Court of Equity has jurisdiction.

The Master of the Rolls:—The plaintiff was the purchaser of an annuity of 85*l.* for three lives, for the sum of 700*l.* The defendants are solicitors, who, on the part of the grantor of the annuity, proposed the purchase to the plaintiff: and the defendant Evitt had at one time proposed to become a surety for the payment of the annuity, if two other sureties could not be found; but two other sureties were found. The deeds were prepared by the defendants, with the consent of the plaintiff: and the annuity was regularly paid for three years by Evitt, who had a running account with Lea the grantor, and charged him in that account with the amount of those payments.

The bill charges that the plaintiff was induced to become the purchaser of the annuity by the misrepresentations of the defendants as to the circumstances of the grantor and his sureties, and by their concealment of a part of the facts relative to the actual circumstances of the grantor and his sureties, which were well known to them: and the defendants, it is alleged, had an interest in the raising of the money; inasmuch as the grantor was indebted to them at the time, and they were under liabilities on his account, and the purchase money was to be applied to their payment and indemnity.

If, by the misrepresentation, on the part of the defendants, of facts relating to the circumstances of the grantor or his sureties, or by the concealment, on the part of the defendants, of facts relating to those circumstances, which the defendants were bound to disclose, the plaintiff was induced to become the purchaser of this annuity, and has in consequence suffered a loss, there can, I think, be no doubt that the plaintiff could sustain an action at law for damages against the defendants, in the nature of an action of deceit. But this court, nevertheless, with respect to the fraud, would have a concurrent jurisdiction with a court of law. These principles were fully discussed in the case of Evans *v.* Bicknell, 6 Ves. 173.

[Adamson *v.* Evitt.—2 Rus. & Mylne, 66.]

The only representation, admitted by the defendant to have been made to the plaintiff, was, that the grantor was an officer of the East India Company, with a salary of about 1000*l.* a year: and, in truth, he was such an officer, with a salary of about 900*l.* All other misrepresentations (if this can be deemed a misrepresentation) are expressly denied.

It is proved that the defendant Evitt did at first offer to become surety for this grantor, though he did not ultimately enter into that engagement; and it is argued that this offer to become a surety is evidence that he represented the grantor as a person in competent circumstances. I cannot charge the defendants by such an inference. The request of the plaintiff that the defendant should be a surety, rather affords evidence that the plaintiff had not full confidence in the solvency of the grantor. There is no evidence or admission of any material representation on the part of the defendants, with respect to the sureties.

It appears that the grantor, being indebted to the extent of 1300*l.*, had, shortly previous to the grant, executed a deed, whereby he assigned 400*l.* a year, part of his salary, and the lease of the house in which he lived, to trustees for the benefit of his creditors; that he had confessed a judgment for 2000*l.* for the same purpose; and that the defendants in these transactions were concerned for him as his attorneys. It is said, that they ought to have disclosed these circumstances to the plaintiff; being to be considered as his attorneys also, because, with his consent, they prepared the annuity deed. The mere preparation of the deed could not place the defendants in a confidential relation towards the plaintiff in this transaction.

The grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation. He is bound only to give honest answers to questions put to him by the intended grantee. The agents of the grantor stand in his situation, and are not bound to do more.

There was at the time of this grant a running account between the grantor and the defendants, upon which the defendants were then indebted to the grantor in the sum of 150*l.*; but they were under liabilities for him to the amount of 200*l.*: so that, upon the whole, they might be protected to the amount of 50*l.* by this purchase of the annuity. The defendants were clearly not bound to disclose these circumstances to the plaintiff. But the head of concealment in this case is altogether out of the question. So far from any concealment being admitted, the answer of the defendant Evitt, with whom principally Adamson professes to have dealt, expressly states, that all these circumstances were disclosed to the plaintiff before his purchase, and that the plaintiff relied upon the inquiries which he himself made with respect to the grantor and the sureties.

The grant of the annuity of 85*l.* is for three lives; and the price paid is a sum of 700*l.* The plaintiff is an auctioneer, and accustomed, no doubt, to transactions of this nature. He could not but know that the grantor was in embarrassed circumstances; for no person not embarrassed would submit to such terms. The very terms of the purchase imported hazard in the transaction.

The plaintiff has made out no case, which can in reason throw the loss upon the defendants: and the bill must be dismissed with costs.

Brook *v.* Smith.

2 *Rus. & Mylne*, 73.

THE testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser, under the 1 W. 4. c. 47, s. 11.

November 26, 1830.

Chapman *v.* Tennant.

2 *Rus. & Mylne*, 74.

THE eleventh section of the 1 W. 4. c. 47, extended to a case where the decree in the cause was made prior to the act.

December 21, 1830.

Shewen *v.* Vanderhorst.

2 *Rus. & Mylne*, 75.

After a decree in a suit for the administration of assets, an executor is not at liberty to do any act which affects the relative rights of creditors.

December 4, 1830.

UPON an account of debts before the Master, in a suit for the administration of assets, the plaintiff had objected to the demand of a creditor, upon the ground that it was barred by the statute of limitations, and the Master allowed the objection, though the executor did not set it up, and was willing to waive it.

The creditor excepted to the Master's report; insisting that the executor of the debtor was at liberty, if he thought fit, not to set up the statute of limitations as a bar to any debt, and that, as he had not insisted upon it, the plaintiff could not raise the objection.

The Master of the Rolls overruled the exception. He stated the ground of his decision to be, that, after a decree, the executor was not at liberty to do any act which affected the relative rights of creditors.

His Honour's decision was, on appeal, confirmed by the Lord Chancellor.*

* The argument and judgment on the appeal have been already reported in 1 Rus. & Mylne, 347; but, from an accidental circumstance, the ground of the decision of the Master of the Rolls is not there stated.

Davis *v.* Battine.

2 Rus. & Mylne, 76.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security.

December 7, 1830.

A CREDITOR, who had a mortgage security for his debt, had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the insolvent act.

On an exception to the Master's report, the question was raised, whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

Mr. Treslove and Mr Martin, in support of the exception.

In Burnaby's case, 1 Strange, 653, it was held that a creditor, who had taken the body of his debtor in execution, could not be a petitioning creditor to sustain a commission of bankrupt; because the body of the debtor being in execution was, in point of law, a satisfaction of the debt. If the debt be absolutely satisfied, how can the creditor claim further satisfaction? No instance can be adduced in which a mortgagee, having taken the body of the mortgagor in execution for the mortgage debt, has gone on to foreclose. The principle of the court is, that a mortgagee, though he may have recourse to all his remedies, cannot have a double satisfaction. If he forecloses and sells the estate, he will not be permitted afterwards to sue on the covenant for the deficiency. Perry *v.* Barker, 13 Ves. 198; Tooke *v.* Hartley, 2 Bro. C. C. 125, Greenwood *v.* Taylor, 1 R. & My. 185.

Mr. Wilbraham, *contrà*.

The Master of the Rolls said, he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he overruled the exception.

Walsh *v.* Wallinger.

2 *Rus. & Mylne*, 78.

Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint:

Held, that the wife could appoint only by will, and that children living at her death were only entitled to share in an unappointed portion of the fund.

December 3, 6, 1830.

THE testator, John W. Arnold Wallinger, by his will, dated the 19th of January, 1805, gave his personal estate to his wife, Matilda, for her own use and benefit, and devised all his real estates to trustees upon trust to sell the same, and, after deducting the expenses of the sale, and paying the incumbrances thereon, and all his just debts, to pay the residue "unto his said wife, to and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him in such manner as she should appoint."

The testator died on the 23d of January, 1805, leaving his widow, a son, and eight daughters him surviving.

By an indenture bearing date the 14th of February, 1817, to which John A. Wallinger the son was a party, the mother, in order to place him advantageously in partnership, appointed to him the sum of 1000*l.*, part of the residuary fund: and it was thereby declared and agreed between her and him, "that he the said John A. Wallinger should not be entitled to any further or other portion or share of and in the residue of the moneys arising from the sale of the real estate of John W. Arnold Wallinger deceased, unless the said Matilda Wallinger should, by any deed or deeds in writing, under her hand and seal, or by her last will and testament, make any further appointment or disposition in favour of him the said John A. Wallinger from or out of the same." This sum of 1000*l.* was raised and paid to the son.

Caroline, one of the daughters, died in 1828, without having had any part of the fund appointed to her.

The widow by her will, executed in May, 1828, reciting that two of the daughters were amply provided for, and that her son had already received 1000*l.*, which was as much as could be spared from the daughters, directed that these two daughters and the son should not have any share in her property, and appointed the residue of the trust moneys to her other five surviving daughters in equal shares.

The bill was filed by the five appointees and their husbands, and prayed that the will might be declared a valid execution of the power.

One question in the cause was, whether the widow could appoint to some of the children, totally excluding others.

[Walsh *v.* Wallinger.—2 Rus. & Mylne, 78.]

Mr. Pemberton and Mr. Longly, for the plaintiffs.

Mr. Tinney and Mr. Temple, for other parties in the same interest.

It was the intention of the testator to give his wife a very large discretionary power over his property; the only limit to her discretion was, that no part of the residue was to be given to any person who was not a child of his; but so long as the whole of it was enjoyed by a child or children, she might give it to any one or more of them, according as she might think fit. She was to have an absolute power of selection. In Civil *v.* Rich, 1 Ch. Ca. 309. and 2 Chan. Rep. 141, the power was to give "to children and grandchildren, according to their demerits:" and a gift of the whole to one was sustained. In Burrell *v.* Burrell, Amb. 660, a testator gave all his real and personal estate to his wife, "to the end she might give his children such fortunes as she should think proper, or they best deserve:" and an appointment, which gave a son only one guinea, and was so far clearly illusory, unless the donee of the power was authorized to exclude him *in toto*, was held to be good. Gibson *v.* Kinven; 1 Vern. 66; Spencer *v.* Spencer, 5 Ves. 362; Kemp *v.* Kemp, 5 Ves. 861.

Mr. Bickersteth and Mr. Cooke, *contrà.*

The property is to go to the children in such manner, that is to say, in such manner and proportions as the widow should appoint. All are to participate substantially: and her authority is merely to vary the respective shares. Kemp *v.* Kemp, Vanderzee *v.* Aclom, 4 Ves. 771; Mason *v.* Limbery.*

The Master of the Rolls:—The question is, whether the words "in such manner as she shall appoint," import that the widow was to have the power to exclude any of the children, or merely that she was to give the property to them in such shares as she might think fit, and as might best suit their respective circumstances. If the direction had been, that at her death the property should go to the children as she should appoint, all the children, according to decided cases, must have taken. There is no sensible or substantial distinction between such a direction and the expressions which are used here. Therefore, all the children are entitled, who were capable of taking under an appointment by the mother.

Another question was, whether the personal representatives of Caroline, who died in the lifetime of the widow, were entitled to share in a part of the property which was unappointed by the will of the mother.

December 6.—On the one side it was argued, that the mother could make only a testamentary appointment: her power was to give and bequeath, and the instrument was not to take effect till after her death. In Doe. *v.* Thorley, 10 East, 438, the word "leave" occurring in a power, was held to import that the appointment should be made by will. In Kennedy *v.* Kingston, 2 Jac. & Walk. 431, where a sum of money was given to a woman for life, "and, at her death, to divide it in portions as she should choose to her children," a question was raised, whether an unappointed portion of the fund belonged exclusively to children living at her death: and Sir Thomas Plumer said "as the power is to be executed at her decease, it must be for the benefit of those capable of taking. It is, therefore, necessarily confined to children in existence at the time

* Cited in Sugden on Powers, 401. 4th edit.

of her death." The principle of that case has since been approved and followed in Needham *v.* Smith, 4 Russ. 318.

On the other hand, it was contended, that under the words of the testator's will, an interest vested in each child, liable only to be devested by a valid appointment, and therefore that the deceased child took an interest which was never devested: Vanderzee *v.* Aclom, 4 Ves. 771; Boyle *v.* Bishop of Peterborough, 1 Ves. jun. 299; Roper on Legacies, Vol. I. p. 537. Besides, that deceased child might have had a valid appointment made to her. The authority of Malim *v.* Keighley, 2 Ves. jun. 333. 529; (afterwards reconsidered under the name of Malim *v.* Barker, 3 Ves. 150, was directly opposed to the decision in Kennedy *v.* Kingston, and was not referred to in the argument of the latter case. Though the gift was not to come into possession till the death of the mother, she might have made an irrevocable appointment by deed in her lifetime. The words did not restrict the widow to an appointment by will; Grace *v.* Wilson, Sugd. on Powers, 219, 4th ed.

The Master of the Rolls:—Unless the interest be expressly given over in case of no appointment, those children only will take who could take by appointment.

The power here was plainly testamentary, and could be executed only in favour of children who could take by will; and the part unappointed must be divided between the children who were living at the mother's death.

"Declare that the appointment of the trust fund in the pleadings mentioned, made by the will of Matilda Wallinger is void, and that the said trust funds are divisible between the plaintiffs Matilda, Charlotte, Mary Anne, Harriet and Louisa, and the defendants Anna Maria and Elizabeth Francesca, the only children of the testator in the pleadings named, who were living at the death of Matilda Wallinger, except the defendant J. A. Wallinger, in equal seventh parts," &c.

Reg. Lib. 1830, B. 515.

Browne *v.* Blount.

2 *Rus. & Mylne*, 83.

Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the court, the suit cannot proceed in his absence.

December 8, 1830.

THE plaintiff, being a judgment creditor of Sir Charles Blount, sued out a writ of *elegit* upon his judgment, and filed his bill for the purpose of equitable execution against certain real estates which were vested in trustees, upon certain trusts, under which Sir C. Blount was now entitled to the rents and profits during his life. The defendants were the trustees in whom the estates were vested; a son of Sir Charles Blount, who had also an equitable interest under the trusts; and certain persons who, under a

[Browne *v.* Blount.—2 Rus. & Mylne, 83.]

decree of the Vice-Chancellor, had obtained a charge upon the trust estate in respect of another judgment debt.

Sir Charles Blount was now abroad, and had been abroad many years prior to the institution of the suit.

Mr. Bickersteth and Mr. Hull submitted, on the part of the plaintiff, that as the legal estate was vested in the defendants the trustees, the debtor himself was merely a formal and passive party, and the plaintiff was therefore relieved from the necessity of having him before the court. In Cockburn *v.* Thompson, 16 Ves. 321. 326, Lord Eldon observed, that the rule, requiring all persons materially interested to be before the court, had been dispensed with in a great variety of cases as to persons out of its jurisdiction; and that there were many instances of justice administed here in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered. In Smith *v.* Hibernian Mine Company, 1 Scho. & Lef. 238, it is laid down, that where persons interested are out of the jurisdiction, although the court cannot compel them to do any act, it can proceed against the other parties, and if the disposition of the property is in the power of such parties, the court may act upon it.

Mr. Pemberton and Mr. Bethell, for the trustees, contended, that the principle upon which it was impossible for a mortgagee to call for an account in the absence of the mortgagor or his heirs, according to the cases of Fell *v.* Brown, 2 Bro. C. C. 276; and Bradshaw *v.* Outram, 13 Ves. 234. Farmer *v.* Curtis, 2 Sim. 466, must equally apply to prevent the plaintiff from proceeding with the present suit; since the only substantial relief sought by his bill was directed against an individual who had not come within the jurisdiction.

Sir C. Wetherell, Mr. Combe and Mr. Bridger, for other parties.

December 8:—The cause having stood over for a few days, that the cases upon the point might be further examined, the following additional authorities were cited and commented upon: Walley *v.* Walley, 1 Vern. 484; Heath *v.* Percival, 1 P. Wms. 682; Cowslad *v.* Cely, Prec. Ch. 83; Rogers *v.* Linton, Bunb. 200; Darwent *v.* Walton, 2 Atk. 510; Attorney-General *v.* Balliol College, 9 Mod. 407; Williams *v.* Whinyates, 2 Bro. C. C. 399; Thompson *v.* Topham, 1 Y. & Jerv. 556; Redesdale on Pleading, page 172, 4th edit. The plaintiff's counsel also referred to the cases of Curling *v.* Marquis Townshend, 19 Ves. 628; and Tanfield *v.* Irvine, 2 Russ. 149. Coward *v.* Chadwick, ibid. 150, n; as showing, that even if the court could not grant all the relief prayed, it would at least go the length of appointing a receiver.

The Master of the Rolls stopped the cause, stating that Sir Charles Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence. *

* So Roveray *v.* Grayson, 3 Swan. 145 n.; Stratton *v.* Davidson, 1 Rus. & Myl. 484. Lord Eldon appears to have sanctioned some relaxation of the strict rule in cases of interpleader; see Stevenson *v.* Anderson, 2 Ves. & B. 407. Martinius *v.* Helmuth, ibid. 412. 2d edit.

Hopkins *v.* Myall.

2 *Rus. & Mylne*, 86.

Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment, to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children.

December 10, 1830.

UPON the marriage of Mr. and Mrs. Myall, certain property of the wife was assigned to trustees, upon trust for the wife during her life, for her separate use, with remainder as the wife should appoint by any writing under her hand, attested by two witnesses; and for default of appointment, then, after the death of the wife, to the children of the marriage in manner therein mentioned.

The trustees, upon an application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. The wife died without having made any other appointment of the fund.

The present bill was filed by the children after the death of the mother, to charge the trustees for a breach of trust, and to compel them to replace the fund.

Mr. Bickersteth and Mr. Jacob, for the plaintiffs.

Mr. Rolfe and Mr. Pattisson, *contrà*, submitted that this was analogous to the case of an informal appointment, which, though not executed strictly according to the power, would nevertheless be referred to it, and be upheld as an effectual execution in equity, provided the intention to dispose of the fund was clearly manifested; Blake *v.* Marnell 2 Ba. & Be. 35; Routledge *v.* Dorril, 2 Ves. jun. 357. The general rule was, that if a trustee, who holds a fund in his hands, pays it over to a third party by the direction of the *cestui que trust*, such payment cannot be afterwards recovered back from the trustee, and no authority could be found which raises any exception in favour of a feme covert. Pollard *v.* Greenvil, 1 Ch. Ca. 10; Wright *v.* Englefield, Amb. 468; Moodie *v.* Reid, 1 Mad. 516.

The Master of the Rolls:—The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, and are matters of substance, and not of form; and without an adherence to those ceremonies, the interests of the children could not be defeated. Cocker *v.* Quayle, 1 Russ. & My. 535.

Kendall *v.* Beckett.

2 Rus. & Mylne, 88.

In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the court having decided against the plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs.

December 8. 10, 11. 22, 1830.

THIS was a suit, instituted by the purchaser of a reversionary interest in a sum of stock, against the executors of the vendor, and against several other parties interested in the fund, for the purpose of enforcing a specific performance of the contract. In the event of the court refusing that relief, the bill prayed, in the alternative, that the plaintiff might be declared to be a creditor of the defendants, the executors, to the amount of 25*l.*, the sum which he had paid by way of deposit on his purchase.

The Vice-Chancellor having dismissed the bill with costs, the plaintiff appealed to the Lord Chancellor.

Mr. Knight and Mr. M'Dougall, for the appellant, contended, that, upon the result of the evidence in the cause, the price obtained was ample, and the whole transaction stood clear and above suspicion. The sale had taken place under circumstances which made it equivalent to a sale by auction, so that the purchaser was relieved from the burthen of proving the adequacy of the consideration. Shelly *v.* Nash, 3 Madd. 232. That the great rise in the value of the property sold, consequent upon the death of the tenant for life of the stock shortly after the transaction took place, did not affect the validity of the sale, was clear, upon the principles laid down in Jackson *v.* Lever, 3 Bro. C. C. 605; and Kenney *v.* Wexham, 6 Madd. 355; and the decisions in Doloret *v.* Rothschild, 1 Sim. & S. 500; and Adderley *v.* Dixon, 1 Sim & S. 607, satisfactorily showed that equity would decree the specific performance of a contract of which the subject matter was a chose in action.

If, however, on examining the evidence, the court should be of opinion against the plaintiff's right to a specific execution of his contract, he would then be clearly entitled to a decree for repayment of his deposit. This alternative relief was expressly asked by the prayer, which was purposely so framed in order to avoid a circuity of actions, and to enable complete justice to be done between the parties, an object which courts of equity were always anxious to attain. To that extent, at least, the Vice-Chancellor's decision must be reversed. Denton *v.* Stewart,* and Greenaway *v.* Adams, 12 Ves. 395, were authorities for such a decree.

The Solicitor-General, Sir. E. Sugden, Mr. Agar, Mr. Skirrow, Mr. Rose, Mr. Hayter, Mr. Kindersley, Mr. Bethell, and Mr. Milford, appeared for different defendants.

They cited and relied upon Peacock *v.* Evans, 16 Ves. 512, and Gowland *v.* De Faria, 17 Ves. 20, where Sir W. Grant considered it to be perfectly settled, that the purchaser of a reversionary interest, seeking to

* Reported in the note to Todd *v.* Gee, 17 Ves. 276.

enforce his bargain, was bound to show that a full and adequate consideration had been paid. In the present instance, the plaintiff had utterly failed in making out that point, and it was unnecessary to enter into the other questions that had been raised. Shelly *v.* Nash was overruled by Fox *v.* Wright, 6 Madd. 111.

The Lord Chancellor held it to be clear, as laid down by Sir W. Grant in the cases referred to, that where the purchaser of a reversionary interest sought the assistance of the court, the burthen was imposed on him of showing that the transaction had been in all respects fair, and that a full and adequate consideration had been given. So far from the plaintiff having complied with that exigency in the present instance, there was a preponderating weight of evidence tending to prove that the price had been inadequate. Without going into the particular details of that evidence, or computing the exact quantum of inadequacy, it was enough to say generally that the plaintiff had altogether failed in making out a case for the interposition of the court. The main object of the suit having thus signally failed, there only remained to be disposed of the question raised by the alternative part of the prayer, asking repayment of the deposit as a debt. In a case, however, where the sum was so very small, and where it was admitted moreover that no demand had been ever made, the court would be extremely slow in acceding to such a claim, especially in favour of a party whose conduct was tainted with unconscientious dealing. Even under circumstances entitled to favour, the jurisdiction was at best extremely doubtful. The language of Lord Eldon in Todd *v.* Gee, 17 Ves. 273, speaking of Denton *v.* Stewart (which had been cited in the case under appeal), distinctly showed the opinion of his lordship, that, except in a very special case indeed, the species of relief prayed in the alternative by this bill ought never to be granted, and no such case was now presented to the court.

December 22.—His lordship on a subsequent day observed, that it had always been held to be a sound rule of practice, and it was one from which he was not disposed to depart, that a plaintiff should not be permitted to introduce into a corner of a bill some secondary and trivial claim, on which, if it stood alone, he might be entitled to succeed, in order as it were to catch a decree on a minor point, in the event of his failing in the main object of the suit. The prayer for the restitution of the deposit money he considered to come within this description. The decree, therefore, must be affirmed generally, and the bill be dismissed, with costs.

Handfield *v.* Wildes.

2 Rus. & Mylne, 91.

TO ground an order for the serjeant at arms under the 1 W. 4. c. 36, s. 15, rule 1, the affidavit must state the party's belief that at the time of suing forth the attachment the defendant was in the county into which

the writ was issued, and not merely that his last known place of residence was in that county.

December 13, 1830.

Wright *v.* Green.

2 *Rus. & Mylne*, 93.

TO ground an order for the serjeant at arms under the 1 W. 4. c. 36, s. 15, rule 1, the affidavit need not state the party's *belief* that due diligence has been used in ascertaining the defendant's residence, and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the court of their truth.

January 25, 26. 28, 1833.

Weaver *v.* Maule.

2 *Rus. & Mylne*, 97.

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be re-admitted as tenant in fee according to the custom of the manor:

That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt.

December 13, 17, 1830.

THE plaintiff, being seised to him and his heirs of a certain tenement according to the custom of the manor of Taunton Dean, in the county of Somerset, borrowed the sum of 700*l.* of one John Ball, and for securing the repayment of the same, he, on the 12th of May, 1824, duly surrendered the tenement into the hands of the lord of the manor, to the use and behoof of John Ball and his heirs and assigns for ever, according to the custom of the manor, subject nevertheless to the trusts, declarations,

[Weaver *v.* Maule.—2 Rus. & Mylne, 97.]

and agreements mentioned and contained of and concerning the tenements, in a certain indenture, bearing even date with the surrender, and made between the plaintiff of the one part and John Ball of the other part. Upon this surrender John Ball was duly admitted. By the indenture therein referred to, it was agreed between the plaintiff and John Ball that the tenement should be held and enjoyed by Ball, his heirs and assigns, according to the custom of the manor, upon trust that Ball, his heirs and assigns, might at any time, after giving one year's previous notice in manner therein mentioned, sell and dispose of the tenement, and, by and out of the moneys arising from such sale, and the rents and profits of the premises in the meantime, in the first place pay and discharge all rates, taxes, and lord's rents, and all expenses to be incurred in keeping the premises in repair, and in assuring the same against fire, and all expenses incurred in the sale, and should, in the next place, pay off and discharge the sum of 700*l.* and all interest due thereon, and should pay over the surplus moneys, if any, to the plaintiff, his executors, administrators and assigns.

In the month of August, 1825, John Ball died intestate and without an heir; and administration of his personal estate and effects was granted to the defendant George Maule, on the nomination of the crown.

The mortgage premises had not been sold, nor had any notice been given by Ball, in his lifetime, of an intention to sell them, and at his death the sum of 700*l.*, with an arrear of interest, remained due to him. Soon after the death of John Ball, William Kinglake, the lord of the manor of Taunton Dean, caused proclamation to be made at three several courts for the heir of John Ball to come in to be admitted to the tenement; and, no heir having appeared, he issued a warrant of seisin of the tenement, claiming to be entitled to the same by reason of the failure of heirs of John Ball. The plaintiff then filed the present bill against William Kinglake and George Maule, praying to have it declared that he was entitled to the equity of redemption of the copyhold tenement.

There were two questions in the cause.

I. Whether, under the circumstances, the plaintiff had an equity of redemption as against the lord, and was entitled, upon payment of the 700*l.* and interest, to be re-admitted to the copyhold tenement.

II. If the mortgagor had a right to redeem, who was entitled to receive the mortgage money; the lord, or the personal representative of the mortgagee?

Mr. Bickersteth and Mr. Jacob, for the plaintiff.

Mr. Tinney and Mr. B. Parry, for the lord of the manor.

For the plaintiff it was argued that this, though in form a trust for sale, was substantially a mortgage; and that, as in the analogous instance of freehold estate escheated to the crown, the lord must take the property subject to the rights of the mortgagor; and the same rule applied if the conveyance were considered as a trust. Paulett's case, Hard. 465; Attorney-General *v.* Reeve, 2 Atk. 223. It was clear from the judgment of Lord Mansfield and Sir Thomas Clarke, in Burgess *v.* Wheate, 1 Ed. 177; 1 W. Black. 123, that a mortgage eschcats, subject to the equity of redemption, and that the mortgage money must be paid to the personal representative of the mortgagee; Attorney-General *v.* Henchman, 2 Sim. & St. 498. If the circumstance of the premises being copyhold created any difference, still the peculiar form of this surrender and admittance preserved the plaintiff's equity as against the lord, and brought the case

exactly within the principle of Lord Mansfield's observation, that if the lord "consents to a condition or trust on the court roll, then he is bound by it, for he cannot claim against his own act." 1 Eden, 232; The King *v.* Haddenham, 15 East, 463.

On the other hand, it was contended, on behalf of Mr. Kinglake, that the conveyance was not a mortgage, but a trust for sale; and that, as the premises in question were of copyhold tenure, the rules and decisions with respect to freeholds escheating to the crown had no application. It was a settled principle that the lord of a manor could not be affected by any trust to which he was not an assenting party. Peachy *v.* Duke of Somerset, 1 Strange, 447. vi. Vin. Ab. 113; 1 Watk. Copyh. 2d ed. 276; Howard *v.* Bartlet, Hob. 181. The entry of the trust upon the court rolls was the unauthorized act of the steward, unknown to the lord, who ought not therefore to be bound by it; especially as upon the recent cases it was extremely doubtful whether, if a tenant made an application for that purpose, the steward had any power or discretion to refuse compliance. 1 Watk. Copyh. 2d ed. 272, n.

Mr. Wray, for the crown.

The Master of the Rolls:—In the case of fee simple lands, the lord, taking by escheat, is subject to the charges and incumbrances of the tenant, because the tenant has full power to create them without the consent of the lord. But in the case of copyholds and customary freeholds, where the title depends upon admission, the lord, taking by escheat, is not subject to the charges and incumbrances, or alienation of the tenant, unless by act of admission he has expressly assented to them. In the present case the tenant surrenders the land into the hands of the lord, to the intent that a new tenant may be substituted in his place, subject to the trusts, declarations, and agreements expressed in a certain indenture, referred to in the surrender; and when the lord admits the new tenant upon such surrender, he is to be considered as thereby assenting to the qualified nature of his tenure, and cannot afterwards claim against those trusts, declarations, and agreements, to which he has thus given his consent. Whether he were or were not, actually acquainted with the nature of the trusts and agreements contained in the indenture, is immaterial. The terms of the surrender gave him full notice of the trusts, and it was his duty to inform himself of their nature.

The lord, in this case, therefore, being to be considered as bound by the trusts of the indenture, becomes himself a trustee for the purpose therein mentioned, and the plaintiff, as against the lord, is entitled to the usual decree to redeem, inasmuch as the equity of redemption still subsists under the indenture, no notice having been ever given by the mortgagee, so as to acquire the right of exercising the power of sale.

The question remains between the lord and the defendant, the personal representative of John Ball, which of them is to receive the money to be paid by the plaintiff upon the redemption. The lord, having by his admission upon the surrender consented to the mortgage, it follows that the mortgage money is part of the personal estate of the mortgagee, and is to be received by his administrator.

The decree must, therefore, be to continue the injunction restraining the lord from all further proceeding at law, to recover possession of the customary tenement; to declare that the plaintiff is entitled to redeem as against both defendants; to direct the usual account of what is due upon

the mortgage, and that, upon payment of what shall be so found due to the defendant, the administrator of Ball, the lord do regrant the tenement to the plaintiff, to be held to him and his heirs, according to the custom of the manor, as upon his former admission, he paying to the lord, or his steward, the fine and fees due upon his admission. Considering the novelty of the case, let the decree be without costs.

Gronow *v.* Edwards.

2 *Rus. & Mylne*, 102.

A MODUS payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden-stuff is good, though it be not alleged to be growing in a garden.

December 21, 1830.

Attorney-General *v.* Sibthorp.

2 *Rus. & Mylne*, 107.

CONDITIONAL bequest, "to the fellows and demies of *Magdalen College, Oxford*," upon the happening of a particular event, held void for uncertainty; the language of the condition, and the description of the legatees being so loose and obscure, that the court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking.

December 14. 22, 1830.

Monypenny *v.* Bristow.

2 *Rus. & Mylne*, 117.

The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question.

Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will,

[Monypenny *v.* Bristow.—2 Rus. & Mylne. 117.]

so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That as the defence of the statute of limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued; and,

That the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee.

December 21, 1830. November 16. 18, 1831. January 25, 1832.

JAMES MONYPENNY, by will, bearing date the 11th of February, 1804, and duly attested, after confirming his marriage settlement, whereby certain lands were settled on his wife for a jointure, gave and devised to his said wife, as a further provision, certain lands in the parishes of C. and T. for her life: he then gave and devised certain other lands in the parishes of G. and M. to his brother Thomas Monypenny for life, with remainder to the second son of the said Thomas for life, and to his first and every other son in tail; and he devised certain other lands in C. unto his brother Robert Monypenny for life, with remainder to the son of the said Robert for life, and to his first and every other son in tail; and he gave and devised his house, called Maytham Hall, and the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder and expectancy, except as before devised, unto his brothers Phillips Monypenny, Robert Monypenny and Thomas Monypenny, and their heirs, upon trust, within six months after his decease, to sell or dispose of so much of his said last devised estates as should be sufficient to pay off and discharge all his just debts and legacies, and also his funeral and testamentary expenses, it being his express will and desire that his personal estate should be wholly freed and discharged from all payments and demands whatsoever; and subject thereto, he devised the same to his brother, Phillips Monypenny, for life, with remainder to his first and every other son successively, in tail male, with divers remainders over; and he gave, devised, and bequeathed to his said brother Phillips Monypenny, his heirs, executors, and administrators, all his real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney.

The testator, by a codicil bearing date the 25th July, 1818, which was duly executed and attested, and which he declared to be a codicil to his will, and desired might be taken as a part thereof, after reciting the devise which by his will he had made of the lands in the parishes of C. and T. to his wife for life, continued as follows: "And whereas I am desirous of making a more liberal provision for my said wife, and that she may enjoy the whole of my lands, tenements, and real estates for the term of her natural life, and take my personal estate absolutely, now,

therefore, I do hereby confirm the said hereinbefore recited devise; and I do further give and devise unto my said wife, during her life, all those my lands, &c., in the parishes of G. and M., and also all those my lands, &c., in C. aforesaid" (which the testator recited he had by his said will devised to his brothers Thomas and Robert, and their children respectively); "and I direct that the estate for life, hereby devised to my said wife in my said lands, and situated in the several parishes of G., M., and C., shall vest in possession immediately after my decease, and take precedence of the several estates thereof respectively devised or limited by my said will." The testator then, after the decease of his wife, gave and devised the said lands, &c., so thereby devised to her for life, to such and the same persons, for such and the same estates, and upon such and the same trusts respectively, as would have taken the same by virtue of his said will; and after reciting, that by his said will he had given and devised his house called Maytham Hall, and also all the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, or expectancy, except as before devised, unto his three brothers and their heirs upon trusts therein expressed, he revoked the said last-recited devise; and thereby gave and devised his house called Maytham Hall, and all other his real estate whatsoever which he had by his said will devised to his said three brothers upon the trusts therein mentioned, unto Robert Monypenny, William Forbes, C. Willis the elder, and C. Willis the younger (whom he also named his executors), and their heirs, upon trust, after his decease, to sell and dispose of such parts thereof as might be necessary for raising and paying his debts, legacies, funeral and testamentary expenses, and the expenses of their executorship, it being his express will and desire that his said real estate should alone stand charged therewith, and that his personal estate should be freed and discharged therefrom; and subject thereto, upon trust for his said wife during her life, and after her decease upon such and the same trusts as were declared of the real estate by his said will devised to the said Phillips Monypenny, Thomas Monypenny, and Robert Monypenny, and their heirs by his said will, immediately subsequent to the power of sale in that behalf contained. The will then proceeded thus: "And whereas by my said will I have given, devised, and bequeathed to my said brother Phillips Monypenny, his heirs, executors, and administrators, all and every my real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney; now I do hereby revoke the same devise and bequest, and do hereby give, devise, and bequeath all and every my said estate, so given to the said Phillips Monypenny as hereinbefore lastly recited, unto my said wife for the term of her natural life; and immediately after the decease of my said wife, I give and devise the same unto my brother Phillips Monypenny, his heirs, executors, and administrators, absolutely for ever."

In a subsequent part of the same codicil the personal estate was given to Mrs. Monypenny, clear of debts and legacies; and it was provided that whatever debts and legacies she paid, should be repaid to her with interest, by sale of a sufficient portion of the real estate charged therewith. By an unattested codicil of later date, she was nominated an executrix of the will, to act in conjunction with the executors already appointed.

Subsequently to the execution of the will, but prior to the date of the first codicil, the testator acquired two freehold houses in Birmingham;

[Monypenny *v.* Bristow.—2 Rus. & Mylne, 117.]

and on the 3d of June, 1822, he died, leaving the said Phillips Monypenny, his heir at law, and his widow, Mary Monypenny, surviving. The trustees and executors, with the exception of Robert Monypenny, executed a disclaimer of the trusts, and also renounced probate of the will. The will and codicils were proved by the widow alone; and upon the notion, which all parties appear to have entertained, that under the devise in the first codicil Mrs. Monypenny took a life-interest in the whole of the testator's real property, she obtained the custody of the title deeds and was let into possession of all the real estates, including those charged with the payment of the debts and legacies, and the two after-purchased tenements in Birmingham, and she continued, with the full knowledge of the heir at law, in the undisturbed possession and enjoyment of those estates as long as she lived. On the 5th of December, 1826, Mrs. Monypenny died, having paid debts and legacies to a large amount, which had not been repaid to her at her death.

The amended bill was filed on the 4th of December, 1829, by Phillips Monypenny, the heir at law, and Robert Monypenny, the sole acting trustee, and also the executor of the testator, against her personal representative; and it prayed, among other things, that the title deeds of the real estates subjected to the charge might be delivered up,—that the testator might be declared to have died intestate with respect to the two after-purchased houses in Birmingham,—that an account might be taken of the rents and profits thereof during the time Mrs. Monypenny had continued in possession, and that the plaintiff, Phillips Monypenny, might be at liberty to set off against what should be found due from the defendant on that account, certain sums of money, which the bill stated to be due from the plaintiff to the estate of Mrs. Monypenny, in respect of her disbursements as the executrix of her husband, the plaintiff submitting, that if upon the result of the account a balance should be found due to the defendant, a sufficient sum for the payment thereof should be raised by sale or mortgage of a portion of the real estates charged. The answer of the defendant did not set up the statute of limitations as a bar to any part of the demand.

Mr. Pemberton and Mr. Barber, for the plaintiff.

Mr. Tinney and Mr. Goodeve, for the defendant.

The first point argued was, whether, under the words of the will and codicil, Mrs. Monypenny was entitled to the rents of the houses at Birmingham during her life.

The Master of the Rolls decided that the houses at Birmingham did not pass to Mrs. Monypenny.

It was then argued for the defendant that, as Mrs. Monypenny had been let into possession, and had continued during her whole life in the peaceable receipt of the rents of the houses in question, under a mistake into which all parties innocently fell, and as those rents had been paid to her with the assent and approbation of the plaintiff, the latter was not now entitled to be relieved against the consequences of his own error, more especially in a case where he had every means of informing himself of his rights, and the error was purely one of law. Bilbie *v.* Lumley, 2 East, 469; Brisbane *v.* Dacres, 5 Taunt. 144; Skyring *v.* Greenwood, 4 B. & C. 281; Andrew *v.* Hancock, 1 Brod. & Bingh. 37; Bramston *v.* Robins, 4 Bingh. 11. It was farther contended, that these rents being wrongfully received by Mrs. Monypenny, could have been recovered in her lifetime only by an action of trespass, and that this action, being

founded in *tort*, died with her, so that the rents were no longer recoverable by the plaintiff. And farther it was said, that although in some cases the action of trespass might be waived, and the action for money had and received adopted, that could not be the case where the title of the land came into question, as it did here, inasmuch as the plaintiff by his bill submitted that point to the judgment of the court. In support of this proposition, the cases of Cunningham *v.* Laurents, 1 Bac. Abr. 260, Gwill. ed.; Newsome *v.* Graham, 10 B. & C. 234, and Marshall *v.* Hopkins, 15 East, 309, were cited. The defendant also insisted that, if the plaintiff was entitled in this suit to claim any part of the rents of the Birmingham houses received by Mrs. Monypenny, he could claim only such rents as were received by Mrs. Monypenny within six years from the filing of the amended bill which first raised the claim to them; for unless the plaintiff could by action at law have recovered them from the defendant, he could not recover them in equity.

For the plaintiff reliance was placed on Hambly *v.* Trott, Cowp. 371; and Pulteney *v.* Warren, 6 Ves. 72.

The Master of the Rolls:—The general principle which governs cases of this kind is stated in Hambly *v.* Trott, Cowp. 371. In that case Lord Mansfield, after citing a case from Sir Thomas Raymond, in which an executor was held not to be chargeable in *tort* for a wrong done by his testator, expresses himself in the following manner:—"Sir Thomas Raymond adds, *vide Saville*, 40, a difference taken. That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood Justice said, 'in every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only in satisfaction of the injury done, there his executor shall not be liable.' These are the words Sir Thomas Raymond refers to. Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." Therefore, where the trespasser commits an injury, without benefit to himself, and dies, then the action dies with the person. But where the injury is attended with a profit to the trespasser, there the party may waive the *tort*, and bring an action of *assumpsit* against the executor for the value of the property taken by the trespasser.

It is truly said, that the title to land cannot be tried in an action for money had and received; but this is to be understood of cases where the present right to land is in question, and not cases where the question applies only to past-gone rents. If the plaintiff had proceeded against Mrs. Monypenny in her lifetime, and during her possession of the land, he could not have sustained the action for money had and received, but must have proceeded by ejectment, for there the title to the land would

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have been in question. This distinction governed the late case of Pearce *v.* Day* before Lord Tenterden, where, after the death of a bankrupt, who had been tenant for life of certain property, his assignees recovered, in an action for money had and received, the past-gone rents of his life-estate from a person who had received them under colour of a fraudulent mortgage deed. An action for money had and received may be brought to recover the profits of an office, although the defendants set up a title to them.

I am of opinion, however, that the plaintiff cannot, upon the principle of set-off, claim to be allowed the amount of the rents thus received by Mrs. Monypenny against the demand of the defendant for the debts and legacies paid by that lady, because the sums which she has so paid do not form a personal demand against the plaintiff.

If an action at law had been brought by the plaintiff Monypenny against Bristow to recover these rents, and Bristow had not at law pleaded the statute of limitations, Monypenny would have recovered the full amount of the rents received beyond the six years: and as Mr. Bristow has not in this suit in equity set up the statute, the plaintiff is entitled here to the full amount of the rents received by Mrs. Monypenny.

November 16. 18, 1831.—The defendant appealed from so much of his Honour's decree as declared that the two houses in question did not pass to the widow by the first codicil, and that her representative was bound to account for the rents and profits thereof received by her in her lifetime.

Mr. Tinney and Mr. Goodeve, for the appellant:

The two houses at Birmingham passed to Mrs. Monypenny by virtue of the codicil of the 25th July, 1818; the effect of which was to make the will speak as of that date: in other words, to republish it on that day. The principle is, that a codicil amounts to a general republication, unless it contains something which, either by express words or plain implication, shows the testator's intention to restrict its operation to some specific purpose. Pigott *v.* Waller, 7 Ves. 98. The doctrine of the courts is to favour republication. 1 Vern. 330. It is not necessary that the codicil should contain any reference to the real estate. Barnes *v.* Crowe, 1 Ves. jun. 486. Nor will a devise by a codicil of part of a testator's after-purchased lands prevent other lands so purchased from passing under a general devise in the will. Goodtitle *v.* Meredith, 2 M. & S. 5; Coppin *v.* Fernyhough, 2 Bro. C. C. 291; Hulme *v.* Heygate, 1 Mer. 285. Sir W. Grant held, in Rowley *v.* Eyton, 2 Mer. 128, that a codicil, by which certain lands were specifically devised, had the effect of republishing the will, so as to subject them to a general charge of debts contained in the will. There is nothing in this codicil which, either in terms or by implication, indicates a different intention on the part of the testator. On the contrary, it was manifestly his purpose, and it was so understood and acquiesced in by all parties, that his widow should enjoy for her life the rents and profits of all his real estates. The recital in the commencement of the codicil indicates this purpose most unequivocally: if it stood alone, it would amount to a devise of all his property

* Tried at the London sittings after Hilary Term, 1826.

to her; and the language of the residuary clause, wherein, subject to a trust for debts and legacies, and subject to his widow's life-interest, he devises Maytham Hall, and all the rest of his real estate whatsoever, to the plaintiff, in strict settlement, must be construed with reference to the recital, and cannot, without defeating the intent, be confined to those residuary estates exclusively, which the will had devised to his three brothers upon trust. The case of Bowes *v.* Bowes, 7 T. R. 482; S. C. 2 Bos. & P. 500, in the House of Lords on appeal, on which the plaintiff will rely, turned upon the use of the word "said," which was held to confine the operation of the codicil, there being no indication of an intention to republish the will, to be collected from any other part of it. Yet even there Lord Thurlow, on an appeal to the House of Lords, considered the codicil to amount to a general republication. Viewing this as a question, not of republication, but of construction, the dispositive parts of the codicil, and particularly the residuary clause, coupled with the strong and unequivocal language of the preamble, are sufficient to pass the after-purchased property with the rest. Bivin *v.* Walker, Amb. 661.

Assuming the decision to be against the appellant upon the first point, it is too late to ask for an account of the rents of these houses after the widow's death. The claim was only set up by the amended bill in the end of the year 1829. The rule at law is, that where a person is in possession, you must first bring ejectment against him, and then resort to the action for mesne profits. If the defendant die before recovery in the ejectment, the remedy is gone, for no action lies for mesne profits while the legal title is in dispute. Newton *v.* Graham, 10 B. & C. 234, Hambly *v.* Trott, Cowp. 371, and Boyter *v.* Dodsworth, 6 T. R. 681, have no application. Where the demand, as in the present case, is of a purely legal nature, courts of equity follow the rule of law and refuse the account. In Barnewall *v.* Barnewall, 3 Ridg. P. C. 24, where after a recovery in ejectment the defendant died, a bill filed against his executor for an account of rents and profits was dismissed; and the language of Lord Eldon in Pulteney *v.* Warren, 6 Ves. 72, recognises the same doctrine. It is clear that, if Mrs. Monypenny were now alive, no action for money had and received, or for use and occupation, could be maintained against her; as the title to the land is disputed, and could not be tried by those forms of action; and her executor stands precisely in her place. The court has no original jurisdiction to entertain a suit for mesne profits, and unless there be equitable circumstances to call its jurisdiction into operation, the parties must be left to their legal remedies; for when equity gives the account, it proceeds on the analogy of the rule at law. Tilley *v.* Bridge, 2 Vern. 519, Pr. Ch. 252; Dormer *v.* Fortescue, 3 Atk. 130; Norton *v.* Frecker, 1 Atk. 524; Hutton *v.* Simpson, 2 Vern. 724.

There are no equitable circumstances to justify the court in interfering, even supposing, contrary to the fact, that a judgment in ejectment had been recovered in the lifetime of the widow. Duke of Bolton *v.* Deane, Prec. Ch. 516. The plaintiff has been himself guilty of great laches in not filing his bill till long after the widow's death; and there is no pretence of fraud: all parties acted innocently. The rents were paid to the widow under a common error, against which, it being an error of law, there can be no relief. Bramston *v.* Robins, 4 Bingh. 11. Neither is there any mutuality of accounts, the judgment of his Honour, from which the plaintiffs have not appealed, having expressly decided otherwise. The mere fact that the remedy is gone at law will not entitle parties to

come into this court for an account. Lansdowne *v.* Lansdowne, 1 Mad. 116; 1 J. & W. 522. In Curtis *v.* Curtis, 2 Bro. C. C. 620, the widow had filed her bill for dower and an account, before the heir died, so that her claim was properly before the court; and in Pulteney *v.* Warren, 6 Ves. 72, the right had been established by a verdict in the lifetime of the party.

But, admitting the jurisdiction to exist, still the decree cannot be supported; for where a party who has committed no fraud has enjoyed undisturbed possession under a mistake, or where the plaintiff has been guilty of laches, the account is not to be carried back farther than the filing of the bill; Pulteney *v.* Warren, 6 Ves. 72; Drummond *v.* Duke of St. Alban's, 5 Ves. 433; Pettiward *v.* Prescott, 7 Ves. 541; Edwards *v.* Morgan, M'Clel. 541; Pickett *v.* Loggon, 14 Ves. 215, or, at all events, it ought to be confined to the six years immediately preceding; Reade *v.* Reade, 5 Ves. 744; Harmood *v.* Oglander, 6 Ves. 199; Stackhouse *v.* Barnston, 10 Ves. 453.

Sir E. Sugden and Mr. Barber, in support of the decree:

The first point is decided by Bowes *v.* Bowes, 7. T. R. 482; 2 B. & P. 500, which is on all fours with the present case, and has always been followed and approved. Parker *v.* Biscoe, 3 Moore, 24. Bowes *v.* Bowes, indeed, was much stronger in favour of republication, for there the testator's object was a mere substitution of trustees, and it might well have been supposed that the trusts were meant to extend to all the property he possessed, whereas the sole purpose of this testator's codicil was to subject all the previous devises to a life estate to his wife, in whose favour the interests of the other devisees were to be postponed; and the language used in the codicil is studiously and correctly framed to effect that single object. The idea of passing subsequently-acquired property, the recollection that he possessed any, never once occurred to his mind. The general words of the preamble must be construed with reference to the dispositive clauses which follow, and these are cautiously and expressly confined to the estates already given by the will.

There is more novelty in the second point, but the claim is founded in substantial justice, which the court will not permit to be defeated by technical objections. It has never been determined that a bill will not lie for the recovery of rents and profits, where the title is either not disputed, or has been established by a judgment at law; or where circumstances have precluded the possibility of trying the title by ejectment. The cases referred to of Dormer *v.* Fortescue, Curtis *v.* Curtis, and Pulteney *v.* Warren, as far as they go, show directly the reverse. All that Lord Hardwicke meant to say in Norton *v.* Frecker, and Dormer *v.* Fortescue, was, that he would not, in aid of a mere ejectment bill, where infants were not concerned, and there was neither fraud nor trust to create an equity, make this court ancillary to the ejectment by decreeing an account, instead of leaving the plaintiff to recover the mesne profits by action; and if Barnewall *v.* Barnewall decided any thing farther, its authority is very questionable. It is not the mere loss of the legal remedy by the accident of a wrongdoer's death, which of itself can entitle a party to come here; but in Lansdowne *v.* Lansdowne the account was given against the representative of the tenant for life, except as to the permissive waste. Independently of the general question, and without contending that a decree for an account of mesne profits may be always had in equity as a matter of course, it is enough for the plaintiffs that the circumstances here

are so peculiar as of necessity to ground the jurisdiction. The bill is not filed merely for an account; it prays a delivery of the title-deeds; and the account is incidental to that relief; for the defendant is entitled to retain the deeds till the sums paid by his testatrix, which sums the will has charged on the devised estates, have been repaid. Dormer *v.* Fortescue, 3 Atk. 124. The nature of those counterclaims, too, creates a mutual accountability which especially calls for equitable interposition. The widow having got into possession, with the acquiescence of the heir, under a common mistake, was not a trespasser or wrongdoer, and the heir may therefore elect to treat her as his tenant or bailiff, and come into equity for an account of the rents as moneys received to his use. Supposing those equitable circumstances had been wanting which here give the jurisdiction, the plaintiff might still have had a remedy at law by waiving the tort and proceeding by an action for use and occupation, or for money had and received; for Birch *v.* Wright, 1 T. R. 378, only decided, what is confirmed by Pulteney *v.* Warren, that after bringing ejectment which is founded in tort, a party cannot recover the rents and profits by an action for use and occupation: but in Pearce *v.* Day, before Lord Tenterden, the assignees of a bankrupt who had made a fraudulent conveyance of his life-interest in certain property, and died before ejectment could be brought, recovered the value of the rents and profits from the person in possession under the conveyance; a direct authority to prove that a party may, if he pleases, waive the tort and proceed upon the implied contract.

All the authorities show that if the account is to be given, it ought to be carried back to the time when the title originally accrued, unless, indeed, which he has not attempted in the present instance, the defendant thinks fit to set up the statute of limitations; and that can only be done with effect by formally pleading it to the suit, or insisting upon it by way of defence in the answer.

January 25, 1832.—The Lord Chancellor, after stating the question, and reading the material part of the codicil, continued as follows:—

That a codicil makes the will speak as of its own date, must be admitted to be the general rule; but it may, nevertheless, be framed in such a manner as to operate as a partial republication only, or to work no republication at all. If, for example, I leave by will all my farms at Dale to A., and having afterwards acquired another farm at Dale, I say in a subsequent codicil, "I hereby give to B. the identical farms which my will has given to A.," it would obviously be doing violence to the language to construe those words as carrying the newly-acquired farm. This, in substance, is the case of Bowes *v.* Bowes, 7 T. R. 482; 2 Bos. & P. 500, and in substance also the case before the court, although I take Bowes *v.* Bowes to be the stronger of the two in favour of republication. The testator there had by his will devised all his freeholds and copyholds to six trustees; by his codicil, reciting the trust and revoking it so far as it related to two of the six trustees, he devised to the remaining four his *said* lands, upon the same trusts on which the will had given them to the six; and Lord Kenyon held it to be too clear for argument that the will was not republished by that codicil; an opinion in which Grose and Lawrence, Justices, fully concurred. The case which goes farthest in favour of republication, and farthest from the principle of Bowes *v.* Bowes, is Pigott *v.* Waller, 7 Ves. 98, where Sir William Grant went largely

into the consideration of the subject, and reluctantly followed the doctrine of the more modern decisions. On a subsequent day he said he had omitted to mention Bowes *v.* Bowes, and remarked that the court in that case proceeded upon the intent appearing on the face of the codicil. The case of Goodtitle *v.* Meredith, 2 M. & S. 5, where the general principle is laid down broadly, also recognises the authority of Bowes *v.* Bowes. In Hulme *v.* Heygate, 1 Mer. 290, the Master of the Rolls, while he expresses his entire concurrence with the judgment in Bowes *v.* Bowes, holds it to be "a point now clearly established as a general rule that a codicil duly attested does amount to a republication;" and he afterwards observes, 1 Mer. 294, "I must absolutely deny the inference, that, because the testator has thought fit to specify some of the after-purchased estates in this codicil, I am therefore to exclude all the others. To the question, Why does he expressly mention some except for the purpose of excluding the others, I answer, that the question would apply equally to the will itself, and tend to exclude all the estates whatever, except that which is there specified."

It is quite another thing, however, to maintain that a codicil shall in all cases necessarily amount to a republication; for here it is as if the maker of the codicil had said, "I am now dealing with the property I have given, and with no other." And this view is rather confirmed than shaken by reverting to the preamble on which the defendant's counsel laid so much stress. My observation with respect to that is, that if, upon the subsequent part, the testator's intention were doubtful, that preamble might lead us to a construction of the intention; for ever since the case of Ackerley *v.* Vernon, 3 Bro. P. C. 85, Toml. ed., the principle has been to presume in favour of republication, making that the rule, and the restriction the exception; and thus to throw the burthen of showing a limited intent upon the party who denies the operation of the codicil. I cannot, therefore, agree in thinking that this codicil was no republication, unless the testator thereby indicated an intention to republish. But, inasmuch as the operative words in it appear to me to be sufficiently restrictive, the preamble is not, I apprehend, to be taken into consideration. The decision in Bowes *v.* Bowes, which indeed is a weaker case, seems entirely to dispose of the present question. In Bowes *v.* Bowes, as in the present instance, the testator revokes the devise; but he does here what I take to be much stronger, for the codicil purports to devise "my said estate, so given to the said Phillips Monypenny as hereinbefore lastly recited." And what were the estates which were so given, and what was the recital? Clearly, to use the language of Mr. Justice Grose, the testator could not mean estates afterwards acquired, for they were not then his to give.

Thus far upon the point of republication, which, after all, is but a secondary question, the main contention being, whether the executor of Mrs. Monypenny shall account for the rents of those after-acquired houses which during her life she held without a title, possessing them, not adversely, nor as the bailiff of the owner, and accountable to him (for the owner was ignorant of his rights), nor yet under any contract, hardly even by suffrance, but, as it is alleged, under a mistake in law. Upon this point, I confess, I have felt a great deal of difficulty; but, after the best consideration I have been able to give, and having regard to the peculiar circumstances of the case, I am, on the whole, inclined to agree with his Honour upon this part also of his judgment, and to decide that

the personal representative of Mrs. Monypenny is bound to account for the rents. The leaning ought clearly to be towards making him an accounting party. The niceties at law upon this subject are illustrated in the well known case of Hambly *v.* Trott, Cowp. 371, where Lord Mansfield lays down the doctrine that tort or trespass will not lie against an executor; but that where, besides the crime, property is acquired which benefits the testator, an action for the value shall survive, and that, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged. The judgment, however, in Hambly *v.* Trott does not assist us much, for the question in that case was, not whether the remedy lies against the executor, but whether it lies against the party in his lifetime? Here, on the other hand, there was no ejectment, and consequently no action for mesne profits brought in Mrs. Monypenny's lifetime, as she died before the mistake was discovered.

Upon the whole, although I do not see my way clearly amidst the apparent conflict of *dicta* and authorities upon this point, I can find no satisfactory reason to justify me in reversing the judgment of the court below. I shall affirm the decree without costs, and direct the deposit to be returned.*

Bartleman *v.* Murchison.

2 *Rus. & Mylne*, 136.

A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children, after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman: Held, that the sister on afterwards becoming a widow, was not entitled to the annuity.

January 14, 15, 1831.

THE question arose on the construction of the following clause in a will:—"I give and bequeath unto my mother, Mrs. Janet Murchison, the sum of 100*l.* sterling money per annum, payable every six months during her natural life, and after her decease to my sister Mrs. Margaret Bartleman, that is to say, if my sister be a widow, but not otherwise, but to revert back to my child or children after her death, and that a sufficient

* Upon the effect of a codicil in republishing the will, in addition to the cases cited in the argument, see Guest *v.* Willasey, 2 Bingh. 429, and 3 Bingh. 614, Williams *v.* Goodtitle, 10 B. & C. 895. As to the time from which the account will be directed, and the necessity of insisting upon the statute of limitations by way of defence in the pleadings, Hercy *v.* Ballard, 4 Bro. C. C. 468; Cory *v.* Cory, *post.*; but see Collins *v.* Archer, 1 Rus. & M. 284. In Gardiner *v.* Fell, 1 Jac. & W. 22, no doubt seems to have been suggested as to the right of the court to decree an account of rents and profits from the time when the title accrued against the personal representatives of a person who had been allowed to take possession under a mistake of law, and who died before the title was disputed.

[Bartleman *v.* Murchison.—2 Rus. & Mylne, 136.]

sum for the above purpose shall be invested by my executors in the British funds." The testator also appointed his children his residuary legatees.

Janet Murchison and Margaret Bartleman both survived the testator. At the date of his will and the time of his decease, Mrs. Bartleman was a married woman, and she continued under coverture till some time after the death of Mrs. Murchison, when, her husband having died, she filed her bill claiming the annuity. The executors put in a general demurrer, which the present Vice-Chancellor on argument allowed, and the plaintiff thereupon appealed.

The Solicitor-General and Mr. Temple, for Mrs. Bartleman:

This is a mere question of intention to be collected from the language of the instrument itself, as applicable to the relative situation of the parties. The natural presumption is that the testator wished the annuity to be a provision for his sister (who was plainly an object of his affection), but to take effect only at the time and in the single event of her becoming a widow. The word "be" is here equivalent to become; or the same result will be arrived at by reading the word "if" as if it had been written "when;" a construction frequently adopted where good sense and probability recommend it; Smart *v.* Clark, 3 Russ. 365. During the plaintiff's coverture the burthen of supporting her would of course fall upon her husband: but when he died, her situation would be materially altered; and it is irrational to suppose the testator could have meant to leave her title to his bounty to depend on the collateral accident of her being or not being a widow at the time when the prior life estate determined. According to the clause, even as it stands, every letter of the bequest has been strictly fulfilled, and the plaintiff is therefore entitled to demand the annuity. The bequest is to Mrs. Bartleman *after*, not *at*, the mother's decease; and if she be a widow and not otherwise. The mother is now dead; and Mrs. Bartleman is a widow. It is true she was not a widow at the moment when the mother died: but no such term is annexed to the gift by the will; and the court will not import into it a condition which is not expressed, which is not required by any legal principle, and of which the operation would be to defeat the bequest altogether. There is no peremptory rule of law which prescribes that the vesting of a legacy shall not remain in suspense during any number of existing lives. On the contrary, such suspense is extremely common, as in the case of bequests to females on their marriage, and no practical inconvenience has been found to result from it. Godfrey *v.* Davis, 6 Ves. 43, and other cases of that description have no application: for here the legatee was *in esse*, and her enjoyment only was postponed; and it is not necessary that the interest should become vested absolutely at the determination of the particular estate, provided the period of suspension does not exceed the rule against perpetuities. The peculiar wording of the last sentence, when it speaks of the fund reverting back on the testator's children after Mrs. Bartleman's death, fortifies the construction founded on the language of the bequest; for if the legacy were never to vest in her, or never to be suspended, with what propriety could it be directed to revert back to the children upon that event? and as the capital was to be invested, and the children were to take no interest in the fund till after her decease, the principal till then could not be touched, and what was to become of the dividends in the mean while? Had the testator considered them

undisposed of, would he not have included them expressly in the residuary clause? On the other hand, the claim of the defendants cannot be maintained without doing violence to the will, for either the word "after" must be construed to mean "at," or the description of the legatee must be qualified by the insertion of the word "then," or some other phrase of the like import, and that for the very purpose of excluding her.

Sir E. Sugden and Mr. B. Parry, *contrà*.

There is nothing illegal in the suspense which the plaintiff's construction would require, but it is contrary to the probable intent, and will not be presumed where the words are fairly capable of a different meaning. In deciding questions of this kind with respect to personal property, the court always leans to that interpretation which will prevent or most speedily put an end to the contingency. The rule is founded partly on convenience, partly on the analogy of the law as to real estates, and partly on considerations of probability; and it has prevailed in a variety of cases where the argument now set up was attempted without success. Ellison *v.* Airey, 1 Ves. sen. 111; Godfrey *v.* Davis, 6 Ves. 43. Upon the same principle a legacy to the children of A., or to A.'s children, after the death of B., or to A.'s children generally at twenty-one, will exclude, in the respective cases, all such children as happen to come into *esse* after the death of the testator, or of B., or after the time when the eldest attains twenty-one; these being the first periods respectively when the interest given can by possibility be held to vest. Here, if no prior life estate had been bequeathed, a doubt could not be suggested—the case would range within the first of these classes: the insertion of the life estate to the mother makes it fall precisely within the principle of the second. According to the defendants' construction, not a word requires to be inserted, rejected, or altered. "After" must mean immediately after, that is, at the decease. The obvious purpose was to make a provision for Mrs. Bartleman only in case she was a widow at the determination of the mother's life interest, and not at any time when she should become so. The plaintiff's argument would go the length of holding that the annuity was to be enjoyed *durante viduitate*, to vest the moment she become a widow, and to be again devested every time she married; a most extravagant supposition, and directly at variance with the subsequent clause, by which the fund was not to "revert back" to the children till after her decease. That phrase creates no real difficulty, for it only refers to the case of the legacy having vested; if that has once happened, the fund is not to revert till after the legatee's death. Perhaps the testator may not have contemplated, and therefore not provided for the event that has occurred; perhaps he may have foreseen and not thought proper to provide for it; but either way Mrs. Bartleman can have no claim.

The Lord-Chancellor:—Although, in construing bequests of personal estate, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable, not only with a view to avoid a perpetuity, but also to determine with certainty the persons to whom the property is to go. It may therefore become necessary in construction to supply by intendment the words "living at the time of the testator's death" in a gift of personal, as well as of real estate. For example, in a bequest to the children of A., the words are confined to

such of A.'s children as are living at the testator's death. So where the legacy is given at the determination of a particular estate previously limited;—as where the legacy is to A. for life, and after his decease to the children of B., the like rule of construction, imported from the law as to real estates, is allowed to operate, and it restricts the bounty to the children of B. who are living at the death of A., that being the time when the interest is to vest in possession. A Court of Equity will not presume that a party who is not *in esse* is intended to take, unless such an intention be made plain and put beyond dispute by the words of the will; and it is only following out the same principle to hold that a person, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.

This, then, is the first difficulty. Besides, I greatly doubt whether under the residuary clause the testator meant to deal with the property during the intermediate period while Mrs. Bartleman was a married woman, especially as he has not left that clause to provide for a case which it would much more naturally have covered, and which was much more obviously in his contemplation—I mean the application of the fund in the event of Mrs. Bartleman's death. The probability is that the particular contingency which has taken place never occurred to his mind. According to the plain sense of the words, the bequest is, after the mother's decease, to the sister, provided she be a widow at the period when the interest is to vest, if at all. In general a testator does not provide for all cases. He may, however, have said to himself here, "If my sister be a widow at the death of my mother, she shall have the annuity; but her husband will then see whether I have made a provision for her or not, and will act accordingly; and then, when only she takes it, she shall take it for life, for I will not suspend the gift; I provide only for ordinary circumstances." The authority of Smart *v.* Clark is by no means broken in upon by this construction. The five years there specified had clearly reference to the non-claim only, but upon the death of the legatee at any time, the bequest over was to take effect.

Barnsdale *v.* Lowe.

2 *Rus. & Mylne*, 142.

The court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive.

January 27, 1831.

MR. COOPER moved that depositions taken in this cause might be published, notwithstanding that the witness was alive. The circumstances under which he made the application were these:—An intending purchaser having taken it as an objection to the title of an estate, that two of the attesting witnesses to a will under which the estate was held were dead, it was made a condition of his contract that a bill should be

[Barnsdale *v.* Lowe.—2 Rus. & Mynle, 142.]

filed to perpetuate the testimony of the surviving witness. The bill was filed accordingly, and it now became material to see the effect of the witness's evidence. The principal defendant, the heir at law, was under age, and therefore incapable of consenting; but it was the wish of all parties that the order for publication should be made. Mr. Cooper referred to the Practical Register, Wyat's ed. p. 73; to Harris *v.* Cotterell, 3 Mer. 678; and to Dursley *v.* Fitzhardinge, 4 Camp. 401, as furnishing some authority for contending that, under peculiar circumstances, and in a strong case, the court would relax the strictness of the general rule.

The Lord Chancellor said that, although he felt very great doubt how far he was at liberty to accede to the application, he should, before he finally disposed of it, direct a search to be made for precedents.

January 31.—The Lord Chancellor stated that his observation on the former day, with respect to the understanding of the profession being unfavourable to applications like the one before him, had been fully confirmed by the further inquiries he had made. It appeared from the precedents with which he had been furnished by the Registrar, Mr. Bedwell, that Lord Eldon had, perhaps incautiously, permitted publication to pass in the case of Dursley *v.* Fitzhardinge; but in that case the objection did not seem to have been suggested, and the order probably was made *sub silentio.*

It was evident, however, that Lord Eldon was not altogether satisfied with what he had done on that occasion, for in two subsequent cases where similar motions were made under circumstances of considerable urgency, his lordship declined to follow the precedent he had himself created, and would not listen to the application. The Lord Chancellor added that there would be great danger in departing from the strict rule; the authorities were all against any such departure; and as there was nothing in the present case which peculiarly called upon the court to make an exception in its favour, he felt no difficulty in refusing the motion.

The following are the notes of the cases, to which the Lord Chancellor referred in the preceding judgment:—

Friday, 14*th of December*, 1809.

The Right Honourable William Fitzhardinge, Earl of Berkeley, lately called Viscount Dursley, and others, plaintiffs.

The Honourable Thomas Fitzhardinge Berkeley and others, defendants.

Upon the affidavit of Mr. George Frere of Lincoln's Inn, and an affidavit of notice to the defendants' motion, that the depositions of the late Earl of Berkeley might be published for the above named plaintiff, to make use of them before the House of Lords, or before any committee of the said house; his lordship doth order that the said depositions of the Right Honourable Frederick Augustus, late Earl of Berkeley, be forthwith published accordingly. But the plaintiff's clerk in court is not to publish the depositions of any of the other witnesses.

Reg. Lib. A. 1809, fo. 58.

14*th of July*, 1813.

Coventry *v.* Coventry.

Mr. Richards moved his lordship that publication might forthwith pass, and that the examiner might be ordered to deliver out copies of the depositions.

[Barnsdale *v.* Lowe.—2 Rus. & Mylne, 142.]

The bill had been filed to perpetuate. Sir Samuel Romilly read the Practical Register as the only authority.

Lord Eldon said, depositions ought not to be published, except between the parties in the cause; he had great doubt about the Berkeley case, and great fault had been found with that publication. His lordship observed that very great care should be taken about the practice in this case, and that he would consider it. He added, that the reason why he published the depositions in the Berkeley case was to support the dignity of the family.

The order does not appear from the Registrar's minute book to have been drawn up, and it is not entered.

12*th of February*, 1817.

Morison *v.* Arnold.

In this case the testator made two wills, which materially differed from each other: the latest in point of date he signed in his bed-room, and it was witnessed in an adjoining room by three witnesses, but they did not see the testator sign it, neither did he acknowledge it to the witnesses as having been executed by him. As it became necessary to sell the testator's estates, which were of great value, it was requisite that the second will should be proved not to have been legally executed; and for that purpose a bill was filed in this court to examine the three witnesses, and perpetuate their testimony. After this had been done, and the witnesses had been examined by the examiner, a difficulty arose in procuring publication of the depositions, the witnesses being all alive; and Sir Samuel Romilly on the above day moved his lordship that the depositions might be published, at the same time stating that he could cite no case to his lordship as an authority for the application. Lord Eldon said he would look into authorities, but not finding any, he desired to see the form and allegations of an order where depositions *had been* published. As no precedent could be found where the witnesses were living and the bill had been to perpetuate, the Registrar furnished his lordship with the order made, upon the death of one of the witnesses, in the case of Lord Abergavenny *v.* Powell, 12th July, 1816, Reg. Lib. A. 1815, fo. 1261, (which is in the same form as that in the Berkeley case). His lordship told Sir Samuel Romilly and the Registrar, he thought he should order the depositions to be published; but he observed afterwards, that as the witnesses had signed a declaration on the back of the will that they did not see the testator sign, and that he had not acknowledged the will to have been executed by him, such an order was in truth unnecessary, and his lordship therefore refused to make it.

As it was a matter of great importance to have the depositions published, Sir Samuel Romilly, on the 11th of February, 1817, again pressed the publication, and on the 12th of February, his lordship again said it was unnecessary, as the second instrument was not a will; and he added that he would order the depositions to be published, if a precedent could be produced to him, but not otherwise.

The same application was afterwards renewed before his lordship, who said he was perfectly right in what he had done;

And, as no case could be produced as an authority for such an order, the solicitor for the plaintiff gave up the point, and filed a bill to obtain an issue.

Monkton *v.* The Attorney-General.

2 *Rus. & Mylne*, 147.

Where, in a pedigree case, the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence, upon which the court will direct an issue to investigate a title depending on a question of pedigree.

After a residuary fund had been paid into the exchequer, under a decree establishing the right of the crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the crown, to go before the Master for the purpose of making out their claim.

January 17, 18. 22, 1831.

IN the month of July, 1785, Samuel Troutback died at Madras at a very advanced age, leaving behind him a large fortune, which he had acquired in trade during a long residence in the East Indies. By his will, dated the 21st of July, 1780, he gave the bulk of his property to trustees, for the purpose of founding a school for the education of orphan children, in the parish of St. John, Wapping, "to be called Troutback's Poor Orphan Hospital, or Blue Coat School;" and the will contained very minute directions with respect to the endowment and regulation of the charity.

The motives which (in part at least) influenced the testator in making this disposition of his property, sufficiently appear from the declarations contained in the will itself. After reciting that he had no relation or kindred alive, to his knowledge or belief, having outlived them all, his son George and his late dear beloved wife being the last deceased, the testator bequeathed "five gold star pagodas to every person who shall, within three years after my decease, prove themselves to be lawful sons of any person surnamed Troutback, and born a native of England," and he likewise gave "unto Mr. John Troutbeck, surgeon, late of the ship Speke, in the English East India Company's service, the sum of five gold star pagodas, provided he demand the same of my trustees, at Fort St. George, in person, within three years after my decease, and not otherways, as a person nearly of the same name with Troutback, though I solemnly believe and declare that the said John Troutbeck is not any way related to me, or of the same family and kindred with me, and I disclaim all relationship with him or to him." Next came the following recital:—"And whereas it is natural for all men to have a regard for their native place, and where the seeds of their education were first planted and imbibed, and more especially when they have no kindred or relations alive or in being, which is the case with me, who came on shore naked and shipwrecked in India, at the same time I lost my only brother, who

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was drowned."—The testator then proceeded to dispose of his property for the charitable purpose already mentioned. In the course of that disposition he spoke of the public charity school, built and standing near St. John's Chapel, in Wapping, "being the school where I got my first education, but not boarded at, in the year 1706, 1707, and 1708, during the tutorship of my godfather the late Samuel Jefferies, gentleman, the head schoolmaster." And in another passage, after giving a sum for the purchase of an organ in St. John's Chapel, Wapping, he directed the following inscription to be cut and gilt in front of it. "The gift of Samuel Troutback, merchant, born in this parish, *Anno Domini*, 1700." In another part of his will he stated that providence had "prospered his honest endeavours in the East Indies, during his residence there, now nearly sixty years."

In the year 1792, a suit was instituted for the purpose of administering the trusts of this will, and under the decree the Master was directed to take the usual accounts, and also to inquire who were the testator's heir at law and next of kin. In July, 1813, the Master reported that no heir at law or next of kin of the testator could be found. The report was, in July, 1814, followed by a decree, whereby it was declared that the bequests to charitable uses contained in the will were void, and that, as the testator had left no heir at law or next of kin, the residue of his real and personal estate had vested in the crown; and, accordingly, in the month of April, 1816, a sum of 88,045*l.*, being the produce of the clear residue, after deducting the costs, was paid into his majesty's exchequer in pursuance of that decree.

In June, 1825, George Cawthorne, Catharine Robson, and Isabella Ainsley, who claimed to be entitled to a share of the testator's residuary estate as three of his next of kin, having previously obtained leave from the treasury, were, on their petition in the original suit, permitted to go before the Master for the purpose of establishing their title in that character. In June, 1827, the Master made a report against their claim, and the petitioners thereupon excepted, and at the same time applied that an issue might be directed, in order that the question of propinquity, which the claim involved, might be more thoroughly investigated before a jury. The Vice-Chancellor overruled the exceptions, and refused the trial at law, on the ground that no sufficient *primâ facie* case was shown for it. The claimants now appealed from his Honour's decision.

On the appeal, the main question came eventually to be, how far the Vice-Chancellor was right in rejecting from his consideration, as evidence of the relationship between the testator and the claimants, certain documents purporting to be a genealogical narrative and pedigree of the Troutbeck family. These documents were in the handwriting of John Troutbeck (the surgeon in the East India Company's service, mentioned as a legatee in the will,) and were found in his repositories at the time of his death, which took place in the year 1792.

The narrative bore date 1781, and began in these words:

"The following account of the family of Troutbecks, being the best I can at present collect, I commit it to paper, as a memento, hoping at some opportunity to revise it, and make it more correct and perfect.

"In the following there appears a deficiency about the second generation, which nothing but the examination of old wills can rectify."

After referring shortly to the early traditions of the family, the narrative took up the genealogy at a Sir Robert Troutbeck, who was admitted

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vicar of Newton in 1593, and it went through the history of his descendants in succession as follows:

"Sir Robert Troutbeck was married to Mary Wilkinson, and on the 11th of January, 1637, he died, and was buried at Newton, leaving issue five sons and two daughters, as appears by his will,—William, George, Christopher, Lancelot, and John. William married, and lived at Blencow. George was rector of Bowness in 1660. He died in 1691, and left issue two daughters, who were married to Hodgson of Easton and Lawson of Bowness. Of him it is remarked, that he laid down his gown and took his sword during the civil wars, and then resumed his gown again. Christopher lived nigh Wigton in Cumberland; but whether he had any family I never could learn. Lancelot, it is said, died young. John lived at Ravenhead, and, it is said, had two sons that went abroad, but where is uncertain. William of Blencow had five sons,—George, John, William, Ralph, and Robert. George lived at Blencow. John was educated for the church: he was rector of Willingborough, Northamptonshire, and had three sons,—Edward, William, and Thomas. William lived in Gray's Inn Lane, London, had one son, William, that succeeded him. Ralph married; was in Ireland, and had, it is said, three sons. George, one of his sons, came over to England, and after the death of Ralph the widow came over, with her other two sons, and lived (as Mr. Troutbeck of Madras informed me) somewhere in Wapping, London. She married one Nicholson: they went to live near her son George in Ridon, near Corbridge, Northumberland, where she died. This I was informed by a daughter of George's in 1780. Samuel and Benjamin, two of her sons, went, on this, to sea, and were both in the Prince George Indiaman, when she was lost near Bombay. Benjamin, with most of the crew, was drowned. Samuel got to Madras, where he married a woman from Angengo, and had by her two sons, both of which died young." The narrative then proceeded to trace the descent of the various members of the branch of the Troutbecks settled at Blencow, till it came to the narrator himself, whom it described as one of the three sons of George of Blencow, who was the son of another George, and the grandson of William of Blencow, the brother of Ralph already mentioned; and it spoke of him in these terms: "John went over to America when young, under the direction of his uncle at Boston, in New England, and there served an apprenticeship to John Greenleaf. On account of the troubles breaking out in 1769 he came over to England, and, after attending various hospitals in London, the troubles not ceasing, he went as surgeon of one of the Honourable East India Company's ships, and continued in that employ till 1783, after which he went to the south of France, to all parts of Switzerland, and to Rome, Naples, Florence, Venice, and all parts of Italy." *

The pedigree, which was apparently drawn up at the same time with the narrative, was conformable to it, and the result to be collected from the two together was, that George of Blencow, the narrator's father, and Samuel, the testator, who died at Madras, were descended from the same grandfather, William of Blencow, and were of course first cousins; and that failing Thomas Troutbeck, who was described as the then rector of Woughton, and was the son of John of Willingborough, and therefore a

* The last passage appeared to have been added afterwards, and was in a different ink.

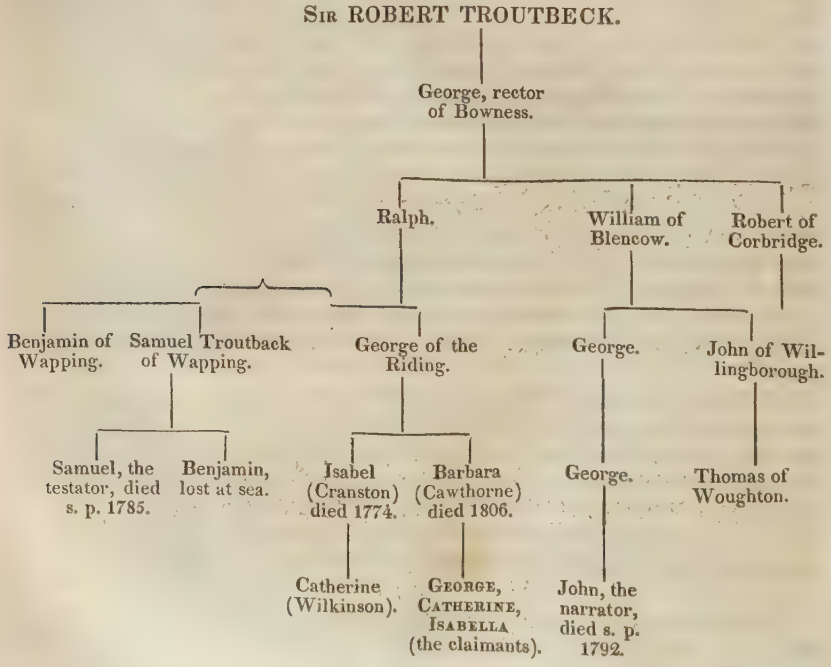
[Monkton *v.* The Attorney General.—2 Rus. & Mylne, 147.]

degree nearer, the narrator and his brother would be two of Samuel the testator's next of kin.

The pedigree set up by the claimants was different in several respects. They, too, derived their origin from Sir Robert Troutbeck; but they contended, and it was established beyond dispute, that his son George, the rector of Bowness, was not the brother but the father of William of Blencow. According to the case they made, George of Bowness was the common ancestor of Samuel the testator, of John the narrator, and of the petitioners. George had among other children Ralph, William of Blencow, and Robert of Corbridge. Of these, William was the narrator's great grandfather. Robert died unmarried, and Ralph married and went to Ireland, where he died, leaving three sons. Two of those sons, Benjamin and Samuel, were supposed to have gone to sea early in life, and to have resided, when at home, at Wapping. George, the youngest, returned from Ireland with his mother, settled at the Riding in Northumberland, and was the claimant's grandfather: Samuel was the father of Benjamin, who was drowned at sea, and also of Samuel the testator.

It was at first conceived that the testator was a brother of George of the Riding, and this was supported by certain hearsay declarations, said to have been made by the latter many years ago, with respect to his having a rich brother in India; but on its being afterwards ascertained that the testator was the son of a Samuel Troutback mariner, and Sarah his wife, and was born in the parish of St. John's, Wapping, in 1700, in which points the entry in the parish register tallied exactly with the statement in the will, that supposition was given up; another generation was interjected between George and the testator, and George's declarations were explained as having reference, not to a brother but a nephew.

The nature of the claimant's case will be understood by referring to the following pedigree:—



[Monkton *v.* The Attorney-General.—2 Rus. & Mylne, 147.]

The evidence satisfactorily proved that George Troutbeck, the son of Ralph, lived and died at the Riding, and that two persons of the names of Benjamin and Samuel Troutbeck, who were alleged to be brothers, and who were described as mariners, lived occasionally at Wapping towards the close of the 17th century. There was no difficulty in connecting the claimants and the narrator with George of the Riding: and the testator was distinctly shown to be the son of a Samuel Troutback of Wapping: the difficulty lay in connecting George with Samuel, and as for this purpose the narrative of John the surgeon became, if admissible, most important evidence, the great contention on both sides related to its admissibility.

Sir E. Sugden, Mr. Pollock, Mr. Knight and Mr. Starkie, for the claimants.

The Attorney-General, the Solicitor-General, Mr. Wray and Mr. W. Brougham, for the crown.

On behalf of the appellants it was first argued, that the narrative of John Troutbeck was admissible as evidence to prove the alleged relationship between George of the Riding and the testator; and in support of that position the following cases were cited and relied on; the Berkeley peerage case, (4 Camp. 401); Vowles *v.* Young, 13 Ves. 140; Doe d. Johnson *v.* Pembroke, 11 East, 504; Doe *v.* Randall, 2 Mo. & P. 20; The King *v.* Inhabitants of Erith, 8 East, 539; Zouch *v.* Waters, 12 Vin. Ab. 244; The King *v.* Eriswell, 3 T. Rep. 707; Whitelocke *v.* Baker, 13 Ves. 511.* It was then insisted that, this document being once admitted, the evidence which it furnished was strong and important, and sufficient, when coupled with hearsay evidence of declarations, and other circumstances, to justify the court in sending the question to be tried by a jury.

The general nature of the arguments urged on behalf of the crown may be collected from the judgment of the Lord Chancellor.

The Lord Chancellor:—After giving the fullest attention to the case, especially upon the matters of law which alone seem to require any particular deliberation, I have come to the conclusion, that I ought in this case to direct an issue.

The grounds of the argument and of my opinion resolve themselves principally into two; that which relates to the admissibility of certain evidence, and that which relates to the facts, including that evidence, namely, the weight of it, if admitted, and the other evidence in the cause.

The first consideration arises upon a document purporting to be an account prepared by a person of the name of John Troutbeck, a good many years ago deceased, who from his own knowledge of the family, from communications with some of its members, and from the best information he was able to obtain, appears to have digested and to have reduced into writing an account of all that he could learn, and therefore believed to be true, respecting his own relations.

The principal point in dispute was the relationship of two individuals of the names of Samuel and George Troutbeck. John was clearly proved to have been related to one of those two, namely, to George: he was not proved—and that was as much in dispute as the relationship of Samuel and George—he was not proved to have been related to the family of Samuel; and this documentary account was objected to, as not falling

* The cases are all collected in 1 Phillips on Evidence, 232. 246, 7 edit.

[Monkton *v.* The Attorney-General.—2 Rus. & Mylne, 147.]

within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence *dehors* the declarations, to connect them with the parties respecting whom the declarations are to be tendered.

I entirely agree, that in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go the length of holding, that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence, (as in one of the settlement cases referred to, where the very place of birth was sought to be proved, and Lord Ellenborough held they were not for that purpose receivable,) King *v.* Erith, 8 East, 539, but declarations of the nature of pedigree; that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died,* or whether they are actually dead;—every thing, in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered.

To say that you cannot receive in evidence the declaration of A., who is proved to be a relation by blood of B., touching the relationship of B. with C., unless you have first connected him, also by evidence *dehors* his declaration, with C., is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity, that if, in order to connect B. with C., I am first to prove that A. is connected with B., and then to superadd the proof that he is connected with C., I do a thing which is vain and superfluous; for then the declaration is used to prove the very fact, which I have already established; inasmuch as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and from the total want of any contrary authority in adjudged cases, or in the *dicta* of judges or text-writers, that the argument fails entirely, which would limit the rule respecting evidence of this description to a greater extent than by requiring you to connect with the family, by matter *dehors* the declaration itself, the party whose declaration you receive.

Neither can I accede to another limitation, for which an argument was attempted to be raised, that the declarations themselves must be looked at, to see whether they are contemporaneous or not. I do not understand this restriction, now for the first time sought to be engrafted upon the rule, but I understand very well how absurd it would be, if introduced; how completely it would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. A person's declaration that his grandmother's maiden name was A. B. has never till this time been questioned as admissible, although it cannot by possibility

* See the following case of Kidney *v.* Cockburn.

be what is called a contemporary declaration, because no man can by possibility have contemporary knowledge of what his grandmother's name was before she was married. If, therefore, the word *contemporary* is to be added as a term of qualification to the subject matter of a declaration, in order to make it competent evidence, all such declarations would then clearly be excluded as go to facts, however well known in the family, which are the common matter of such evidence, and in cases of pedigree you never could go farther back than the recollection of the party swearing to the declaration of the deceased, and the life since the years of discretion, or the years when memory begins to operate, of that deceased person; a restriction which has never been acted upon by any judge, or sanctioned by any text-writer, and never to my knowledge before contended for at the bar.

It is then asked, shall we have no restriction whatever upon the admissibility of such evidence in respect of the subject matter? I have already stated one important restriction, arising from the position in which the party whose declaration is received must necessarily stand to the family. Having once shown him to be a member of the family, by matter *dehors*, you may admit his declaration as to the relationship of any member of that family with any other, or as to the question, (which comes to the same thing,) whether a certain person is a relation of that family.

But is there no further restriction touching the subject matter, and touching the manner in which the declaration is made? Clearly there is, and nothing can be more satisfactory, or more consistent with good sense, or with legal principle and decided cases, than the summary of the doctrine given by Lord Eldon in Whitelocke *v.* Baker, 13 Ves. 511. His lordship there observes, that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or to fall short of it. I entirely agree that the words must be the natural effusion of the party, and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood (for that would equally bias), *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

With the exception of what is said in Drummond's case,* where the evidence is clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it. Lord Tenterden in Doe *v.* Turner, 1 Ry. & Mo. 142, states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that if the son was entitled to the peerage then, the husband ought to have been a peer

* 1 Leach's Crown Cases, 378.

[Monkton *v.* The Attorney-General.—2 Rus. & Mylne, 147.]

likewise. A stronger instance of similarity of situation than this can hardly be conceived, and the case certainly seems to go a great way. But without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration.

One restriction, however, clearly must be imposed; the declarations must be *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances, that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others, of Whitelocke *v.* Baker. There is a still more distinct authority in the Berkeley peerage case, where Mr. Justice Lawrence adopts almost the very language of Lord Eldon in Whitelocke *v.* Baker, and where, proceedings in equity having been instituted to perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*.

Subject to that limitation, therefore, the rule as to declarations is to be taken. And regard must also be had to the occasion on which the party has emitted them. Whatever applies to the evidence of a witness spoken in the box applies equally to written declarations, provided they are brought home to the person supposed to have made them. Till then they are not declarations of one connected with the family. The occasion upon which the declaration is made is, therefore, to be taken into the account.

It was then asked, as an argument for a further restriction of the rule, "if a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, *non constat*, he may not have been in the act of making evidence for himself, by preparing a document which should afterwards profit him, or those in whom he is interested?" To that I answer, show me that the pedigree in question was prepared with that view. Bring it within the rule either of Whitelocke *v.* Baker or of the Berkeley peerage case; prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be (and so far I agree with the argument for the crown), was the evidence in the particular circumstances manufactured, or was it spontaneous and natural? If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should of course at once have rejected it. But upon looking at it and examining it, I cannot, upon the whole, bring my mind to say that it was

[Monkton *v.* The Attorney-General.—2 Rus. & Mylne, 147.]

fabricated in such circumstances, or with such a view, as should bring it within the principle adverted to.

The competency of a pedigree as evidence in such questions has been frequently made the subject of comment, and even of judicial decisions.

One simple form of pedigree, or rather the heads of memoranda furnishing materials for a pedigree, is constantly admitted by every day's practice, I mean entries in family Bibles or other books kept in the family. A memorandum book, an old almanack for instance, which is not so much open to all the members of the family as a family Bible is, has upon one occasion been received: but a family Bible is open undoubtedly to the family, which may be one ground of its admissibility; and I also find, on the authority of Lord Mansfield, that a pedigree is admissible to prove the facts contained in the pedigree, if it be hung up in the family mansion. A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tomb-stone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence.

It is urged, however, and with considerable plausibility, that the principle of all these cases would exclude such a pedigree as this, which was not hung up or in any way made public, and to which it is not pretended that any one had access except the writer himself. But why is it that the publicity is relied upon in those cases? Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tomb-stone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because, in all those cases, the publicity supplies a defect, there existing, but not here existing,—the want of connection between the pedigree, the tomb-stone, the ring, or the Bible, with particular individuals, members of the family. Why is it, for example, that a pedigree hung up in the family mansion is good evidence, although the person who made it is unknown, and is not proved by matter *dehors* the document itself, to have been connected with the family? Simply because of its being hung up in the mansion, where, the presumption is, it would not be suffered to remain, if the whole of the family did not more or less adopt it, and thereby give it authenticity. It is for that reason you admit such a pedigree without knowing who may have been the author. The present question, however, is simply this, whether the pedigree would not be admissible if, instead of being publicly hung up, it were kept in the repositories of one of the family, provided you can show that it is in the handwriting of a member of that family? In this respect the case before me is clearly distinguishable from those which appear to require the publicity of the document in order to make it competent evidence.

Adverting more particularly here to the authority of Lord Mansfield in Goodright *v.* Moss, Cowp. 591, "an entry in a father's family Bible," says his lordship, "an inscription on a tomb-stone, a pedigree hung up in the family mansion, are all good evidence." What follows clearly shows that Lord Mansfield did not consider publicity indispensable, and it is equally clear that he did not consider the circumstance of a man who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, provided that object be not connected with a controversy touching the matter in question, a sufficient ground to exclude such evidence. His lordship's words are, "I have known advice given to a father and mother to make attested

[Monkton *v.* The Attorney-General.—2 Rus. & Mylne, 147.]

declarations in writing under their hand of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance." This may be said, perhaps, to be going great lengths; but at all events it sanctions the doctrine, that the having a distinct object in view, in making a declaration in writing or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient, *per se*, to exclude that declaration; for, continues Lord Mansfield, "if the credit of such declarations is impeached, it must be left to the jury to judge of it." In plain terms, if a father or a mother make a pedigree for the purpose of preventing disputes in the family, his lordship says he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest, but to preserve *a constat*, as it were, on record of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay declarations); and the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the court.

Another restriction was a good deal pressed, that you cannot mount, as it were, an hearsay upon an hearsay; but that what is given in evidence as hearsay must only be of the first degree, so to speak; in other words, that after connecting A. with the family, it is competent, after his death, to give in evidence declarations made by A. as to what came within his own personal knowledge, but not declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject-matter of that tradition can be perpetuated in testimony.

This has been clearly held in Athol *v.* Ashburnham, a case decided in the fourteenth year of the reign of George II., and cited with approbation by Mr. Justice Buller in his work on the law of *Nisi Prius*, Bull N. P. 295. The declarations of a person connected with the family were there given in evidence as to what he knew and had heard, not of course as to specific facts unconnected with matter of pedigree, but,—the subject matter of the declaration being a matter of pedigree, with respect to the relationship of parts of the family or the fate of members of that family,—his declaration at second hand was received in evidence, as well to what he had heard, as to what he himself personally knew.

Notwithstanding, therefore, the introductory part of this document, wherein John Troutbeck sets forth that he had collected the best information he could procure, that he had received some information from the testator, Samuel himself, with whom he had at one time lived in the same country, and that he had only *heard* what he states, making use of the expression "it is said;" notwithstanding the circumstances which alone raise the ground of objection last referred to, I am of opinion, upon the whole, that the document, proved to be in the handwriting of John Troutbeck, who is certified by the Master to be connected with George, is admissible, and good evidence to go to a jury, with the view of con-

necting Samuel with George. All that has been said respecting the mistake into which the narrator certainly did fall as to the degree of relationship between them, all that has been said respecting the discrepancies between the narrative and the will, and the mistake of confounding Samuel the father with Samuel the son, I lay entirely out of view; for such observations apply not to the admissibility, but only to the credit of the document.

Coming now to the second branch of the question, to the effect, namely, of the evidence when admitted, I am decidedly of opinion that if this document is let in, and if the rest of the evidence in the cause, some parts of which very remarkably corroborate other parts of it, goes before a jury, there is a possibility, and something more than a possibility, that Samuel and George may be found to have been brothers, or nephew and uncle, and in that case the claim will be established. There is a perfect possibility, perhaps a probability, that the jury may find the other way. But this is precisely the case for an issue. The case, and the only case for refusing it, is, when there is reason to believe that the finding of the jury can be in no other way but one.

Two issues were accordingly directed to try the question, whether the claimants were the next of kin of Samuel Troutbeck the testator. The issues were tried at the York Spring assizes in 1831, when the jury found a verdict for the crown.

A motion was subsequently made for a new trial; but the Lord Chancellor, after hearing Sir E. Sugden, Mr. Pollock, Mr. Blackburn, and Mr. Starkie in support of the application, refused to disturb the verdict.

Kidney *v.* Cockburn.

2 *Rus. & Mylne*, 167.

Semble, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.

July 15. 21. 31, 1831.

IN this suit, which was instituted for the specific performance of a contract for the purchase of certain freehold premises in the city of London, an important point respecting the extent to which hearsay evidence is admissible in cases of pedigree was very fully considered. The question arose upon the title of the plaintiff claiming as heir at law of a lady of the name of Christian Kidney, who died in 1826; and in order to make out his title in that character, it became necessary for the plaintiff to show that John Kidney the plaintiff's grandfather, and David Kidney the grandfather of Christian Kidney, who were admitted to have been the sons of one Jonathan Kidney of Market Harborough, were born of the same mother. By an order of his Honour the Vice-Chancellor, affirmed by the Lord Chancellor on appeal, the parties were directed to proceed

[Kidney *v.* Cockburn.—2 Rus. & Mylne, 167.]

to a trial in the Court of Common Pleas upon the following issue:—"Whether John Kidney and David Kidney, children of Jonathan Kidney, were brothers of the whole blood." Upon the trial it was established that Jonathan had been twice married; that his first wife died in March, 1693, and his second wife in November, 1703; and for the purpose of showing that his sons, David and John, must have both been children of the first marriage, there were tendered in evidence, first, as to David (whose burial appeared from the parish register to have taken place on the 23d of December, 1750), certain inscriptions, one on an old tombstone in the cemetery, the other on a monumental tablet in the church of Market Harborough, wherein David was stated to have died on the 16th of December, 1750, at the age of sixty-four years. There were then tendered, as to John (who according to the entry in the parish register was buried on the 9th of February, 1760), various declarations made by a deceased grandson of John, and also a letter written by the same grandson many years ago and sent by post to his brother the plaintiff, stating that John their grandfather was seventy years of age when he died. The issue was tried before Chief Justice Tindal, who refused to receive the inscriptions, declarations, and letter, on the ground that, although admissible for the purpose of showing the relationship, they were not admissible as evidence to prove the ages of the several parties referred to therein, these being facts which the learned Judge was of opinion could not be proved by hearsay. The jury found for the defendant; and his lordship, as appeared from his note, was satisfied with the verdict, provided he was right in rejecting the evidence above stated; but the note added, that if such evidence of the age at which the two children of Jonathan died ought to have been admitted and was believed by the jury, there would then be no doubt that John Kidney and David Kidney were brothers of the whole blood.

Sir E. Sugden, Mr. John Campbell, and Mr. Wakefield, moved for a new trial.

The evidence in question was improperly rejected by the judge who presided at the trial; and if it had been admitted, its effects must have been decisive in the plaintiff's favour. There is no rule of law, which, in cases of pedigree, limits the admissibility of evidence of that description to the mere purpose of proving the relationship of parties: the particular nature or degree of their relationship, as uncle and nephew, cousins or the like, is as much a special fact as their ages at a given time or their comparative seniority; and it has never been contended that the statements on a tomb-stone, or the declarations of a deceased relative, are not good evidence upon those points. If admissible for one, they must be admissible for every purpose. Where is any rational line to be drawn? Neither in the cases, where the nature and effect of hearsay evidence have been discussed, such as Goodright *v.* Moss, Cowp. 591, and Vowles *v.* Young, 13 Ves. 140, nor in the answers of the judges to the third and fourth questions in the Berkeley peerage case, 4 Campb. 409, has the distinction taken by Chief Justice Tindal been ever hinted at, much less recognised. The King *v.* Erith, 8 East, 539, which may seem an exception, was considered rather as a settlement than a pedigree case, and is therefore distinguishable; besides, it has been overruled by Higham *v.* Ridgway, 10 East, 109. In Higham *v.* Ridgway hearsay evidence was admitted as to the time of a person's birth. And Herbert *v.* Tuckall, T. Raym. 84; 12 Vin. Ab. 203, where, in order to prove a testator to have

been under age, an almanac containing an entry by his father of the date of his son's birth was produced on a trial at bar, and admitted to be strong evidence, is an express authority to the same effect. In Ryder *v.* Malbone, lately tried before Mr. Justice Littledale at the Stafford assizes, an inscription on a tomb-stone, stating the death of a party at the age of ninety years, was admitted evidence, and the age was in that case material.

The Solicitor-General and Mr. Cockburn, *contrà*:

The ground of admitting the evidence in Herbert *v.* Tuckall, and Goodright *v.* Moss, was the peculiar means of knowledge to which the parent had access, as appears from Lord Ellenborough's observations in Roe *v.* Rawlings, 7 East, 279. The King *v.* Erith, however, is quite decisive, and has never been overruled or impeached. One of the inscriptions is a mere copy of the other; and as some of them are dated as late as 1770, and they are all apparently executed by the same hand, they cannot come within the description of *contemporaneous*. Neither are they set up in the view of the surviving relatives, the only principle on which monumental inscriptions are admissible, Whitelocke *v.* Baker, 13 Ves. 511; for at the time referred to, all the members of the Kidney family had long ceased to have their residence at Market Harborough. How far is the relaxation of the strict rule to be carried? The silence of the books and the absence of authority on the subject show beyond dispute that the doctrine now contended for is as new as it would be dangerous.

The Lord Chancellor at the close of the argument intimated a very strong opinion in favour of the admissibility of the evidence, but said that as the point was one of some nicety he should reserve his judgment till he had time to consider it farther.

July 31.—His lordship stated that his original impression was strengthened by the result of his farther consideration, and by the concurring opinions of Mr. Justice Park and Mr. Justice Littledale, to whom he had submitted the point; but as the decision was a matter of great importance, with a view to future cases, he had come to the resolution of sending the question to the judges of the Court of King's Bench, in the form of a case for their opinion.

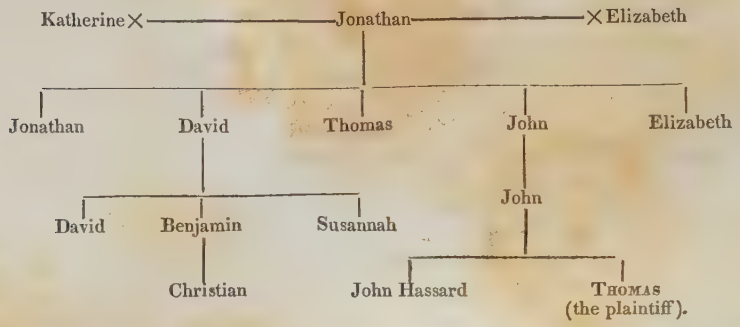
The cause was soon afterwards compromised, so that no farther proceedings were had.

The following is the material part of the order, as it was finally settled by the Lord Chancellor himself:

After reciting the order made by the Vice-Chancellor for the issue, and that such issue was tried on the 15th day of June last, when certain documents and matters offered to be given in evidence by the plaintiff were rejected by the court, and that a verdict was found for the defendant, to the effect that John Kidney and David Kidney were not brothers of the whole blood, the decree stated, as the allegation of the plaintiff's counsel, "That the plaintiff is desirous that a new trial should be had of the said issue, conceiving that the question in this cause is, whether the plaintiff Thomas Kidney is the heir at law of Christian Kidney in the pleadings mentioned? and so much of the pedigree is to be taken for admitted as shows that the plaintiff Thomas Kidney was the grandson of John Kidney the elder, and that the said Christian Kidney was the granddaughter of David Kidney the elder, and that the said David Kidney and

[Kidney *v.* Cockburn.—2 Rus. & Mylne. 167.]

John Kidney were sons of Jonathan Kidney of Market Harborough, deceased; and the question is, whether the said David Kidney and John Kidney were brothers of the whole blood? The following is the pedigree as applicable to this question, omitting dates, and places of births, marriages, and burials:—



Jonathan the son was buried in January, 1685, Katherine the first wife was buried in March, 169$\frac{2}{3}$, Elizabeth the second wife was buried in November, 1703. In order to show that David Kidney the elder was a son of the first marriage of the said Jonathan Kidney, the father of David and John, there is tendered in evidence an original inscription on a tomb in the cemetery of St. Mary, belonging to Market Harborough, which is as follows:—'In memory of Mr. David Kidney, [who departed this life the 16th of December, 1750, aged sixty-four years].' There is given in evidence an examined copy of the burial register of the said David, whereby it appears that he was buried at Market Harborough on the 23d day of December, 1750; and there is tendered an examined copy of a monumental inscription in the church at Market Harborough, erected by Benjamin, a son of the said David Kidney the elder, which monumental inscription is as follows; that is to say,—'In the cemetery of St. Mary, belonging to Market Harborough, are interred the remains of David Kidney, gentleman [who died the 16th of December, 1750, aged sixty-four years]; of David his eldest son by Christian, sister of Sir Robert Kite, late lord mayor of the city of London [who died the 24th of November, 1770, aged thirty-three years]; and of Benjamin Kite, gentleman, brother of Sir Robert, [who died the 15th of July, 1747, aged forty-two years],—in pious remembrance of a kind father, an affectionate brother, and an indulgent uncle, Benjamin Kidney, Esq., erects this memorial.' There is given in evidence an examined copy of the baptismal register at Market Harborough of the said Benjamin Kidney, whereby it appears he was baptised the 15th of May, 1739. In order to show that the said John Kidney the elder was the son of the first marriage of the said Jonathan Kidney, the father of David and John, there is given in evidence the burial register of John, whereby it appears he was buried on the 9th of February, 1760; and there are tendered in evidence by a witness named Ann Kidney, the widow of John Hassard Kidney (the plaintiff's brother), declarations often made to her by her husband in his lifetime, that his grandfather, John Kidney the elder of Coventry (the brother of the said David Kidney the elder), was seventy years of age when he died. There is further tendered in evidence a letter written by the said John Hassard Kidney to the plaintiff Thomas

Kidney, dated the 24th of April, 1788, and bearing the general post-mark, in which the said John Hassard Kidney states the age of his grandfather, the said John Kidney, when his said grandfather died, to be seventy years. If the passages within the brackets in the said inscriptions on the tomb and monument are received, they would show, by a reference to the age and time of death of David, that he was born in the year 1686, and, consequently, that he was a son of the first marriage. If the said declarations made verbally and by letter are received, they would show, by reference to the age of John at the time of his burial, that he was born in the year 1690, and, consequently, that he was a son of the first marriage. The admissibility of the passages in the monument not included in the brackets is not in dispute; and the question for the opinion of the court is, whether the passages in the said inscriptions on the tomb and monument inclosed in brackets, and the said declarations offered to be proved by the witness Ann Kidney, and the letter of John Hassard Kidney, or either and which of them, be admissible in evidence to prove the pedigree in dispute? It was therefore prayed that a new trial of the said issue may be had; whereupon, and upon hearing, &c. *His lordship doth order* that a case be made for the opinion of the judges of the Court of King's Bench, and that the question be, whether or not the passages in the said inscriptions on the tomb and monument inclosed in brackets, and the said declarations offered to be proved by the witness Ann Kidney, and the letter of John Hassard Kidney, or either and which of them, be admissible in evidence to prove the pedigree in dispute," &c.

Stanton *v.* Hall.*

2 *Rus. & Mylne*, 175.

Devise of lands to trustees upon trust, to pay the rents and profits to J. H. for life; but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l.* during his life, and after his decease, an annuity of 30*l.* during her widowhood, and upon certain other trusts as to the residue for the children of the marriage: Held, that the annuity of 100*l.* was not the separate estate of the wife, but passed by the husband's assignment to a purchaser for value; and, that as against such purchaser, the wife had no equity for a settlement out of the annuity.

Dec. 13. 15, 1830.—Jan. 21, 22. 24, 1831.

JOHN HALL the elder devised to trustees certain messuages, tenements, and hereditaments, whereof he was seised in fee, to hold the same unto the said trustees and the survivor of them, and the heirs of such survivor, upon trust to pay and apply the rents, issues and profits of the said messuages, &c., into the proper hands of his son John Hall, or to permit and suffer his said son to take and receive the said rents, issues and profits, to and for his own use and benefit for his life, but so as the

* This and several subsequent cases, relating to the wife's separate estate, and the nature of her equity to a settlement, it has been considered expedient to report together.

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same should not be assignable by him or liable to his debts or engagements; and in case his said son should at any time become insolvent, and execute any assignment or other instrument for the benefit of his creditors; or should commit any act of bankruptcy, and be thereupon declared a bankrupt; or should assign over the said rents; then out of the rents, issues and profits of his said messuages, &c. to pay and apply one annuity or clear yearly sum of 100*l.* unto the wife of his said son, in case she should be living, upon any of such events as aforesaid happening; the said annuity or yearly sum to be paid to her or her assigns for the term of the life of his said son; and after the death of his said son, upon trust to pay and apply one annuity or yearly sum of 30*l.* to her and her assigns, so long only as she should continue his widow. And after any of such events as aforesaid happening, and subject to such annuities and charged therewith, the said trustees were to stand seised and possessed of the said hereditaments and premises, upon trust for all and every the children of his said son, in manner therein mentioned, with benefit of survivorship and accruer, &c.

On the death of the testator, John Hall the younger was let into possession of the devised estates. During his continuance in possession, he represented himself to be the absolute owner of the property; and in that character executed a deed, purporting to convey the fee-simple of the devised estates to a mortgagee;—a fraud which he was enabled to practise the more easily, as he bore the same name with his father the testator, and suppressed all mention of the will. Some time afterwards, John Hall the younger took the benefit of the Insolvent Debtors' Act; and this suit being then instituted by the incumbrancer for the purpose of enforcing his security over all the interest, whatever it might be, which John Hall the younger took under the devise, the question came ultimately to be, whether, in the event which had happened of John Hall's insolvency, his wife, upon the true construction of the father's will, was entitled to the annuity of 100*l.* to her sole and separate use, or whether it belonged to her husband, and was therefore in equity affected by the mortgage?

A motion was made on behalf of the plaintiff, that some person might be appointed to receive the annuity during the pendency of the suit; but the Vice-Chancellor refused the motion, at the same time intimating an opinion that, upon the words of the will, the wife must be considered as entitled to the annuity for her sole and separate use.

The application for a receiver having been renewed before the Lord Chancellor, it was agreed, after some discussion, that as there was no evidence to be adduced in the cause, it would be expedient, for the sake of avoiding delay and expense, to argue the question upon the merits, and to consider the judgment given upon the motion as if it were the decree pronounced at the hearing, so as finally to decide the cause.

Sir E. Sugden and Mr. Ching, for the plaintiff, contended that the question was not what the testator by the particular form or phraseology of the limitations had intended to do, but what he had actually done. It was not enough to show a probable intention to exclude the *jus mariti* from the property of the wife: the language used must be sufficiently strong to prevent the possibility of its attaching; the object being to deprive the husband of his legal rights, by creating a separate beneficial interest in the wife, as if she were *sui juris*, in a manner unknown and repugnant to the principles of the common law. To effect such an object no parti-

[Stanton *v.* Hall.—2 Rus. & Mylne, 175.]

cular form might be necessary, but the expressions, whatever they were, must amount to a total exclusion of the husband; as for example, the phrases "to the sole" or "to the separate use" of the wife, or "to be at her disposal" and "independent of" her husband. *Ex parte* Ray, 1 Madd. 199. The case of Johnes *v.* Lockhart,* cited in *Ex parte* Ray, was mis-stated in the report; but the error was pointed out and corrected in Wills *v.* Sayers, 4 Madd. 409, and the notion that a gift to a *feme covert* for her own use gave her a separate estate, was afterwards exploded in Roberts *v.* Spicer, 5 Madd. 491. In Packwood *v.* Maddison, 1 Sim. & St. 232, a legacy to a married woman, for her support, to be secured by an annuity, was held to vest in the husband, and pass by his assignment. The rule to be collected from all the authorities was, that in order to vest the property in the wife, to her separate use, the instrument must be so expressed as to be inconsistent with any other rational construction. There was, however, nothing irrational in supposing the existence of an intention which the testator had, from ignorance, neglected the proper means of executing; as appeared from an analogous case of frequent occurrence, where a clause of forfeiture failed of effect for want of the necessary limitation over. No case went the length of deciding that a proviso, devesting a husband of a beneficial interest in property, and thereupon vesting it in the wife, should be construed as giving her the property to her sole and separate use: and courts of equity, which had already gone quite far enough in relaxing the strictness of the law on this subject, would not now be disposed to carry the relaxation farther.

Mr. Knight and Mr. K. Parker, for the defendant, Mrs. Hall:

It is admitted that no particular form of expression is required, in order to vest a separate estate in a married woman to the exclusion of the marital right. Neither the word "sole" nor the word "separate" is indispensable. A direction that she shall hold what is given, independently of her husband, or that her receipt shall be a sufficient discharge, is equally effectual for that purpose; the question always being upon the intention of the donor, as it is to be collected from the whole instrument taken together, Lee *v.* Prieaux, 3 Bro. C. C. 381; Prichard *v.* Ames, T. & Russ. 222; *Ex parte* Beilby, 1 Gl. & J. 167. The objection that the defendant is here seeking to defeat a legal right, does not apply; for the legal estate is in trustees, and the interest, whatever it be, which the husband and wife are to possess, is equitable only. The limitation is to the wife, in opposition and contradistinction to the previous limitation to the husband. The subject matter of the gift is, by express words, taken from him upon the happening of a certain event; and in words equally express, a portion of it is thereupon directed to be paid and applied to the wife during the continuance of the coverture; and at the husband's decease her allowance is to be reduced from 100*l.* to 30*l.* a year. All these circumstances raise an irresistible implication that the testator meant to bestow on Mrs. Hall, in the event which he apprehended and therefore provided for, of the son's bankruptcy, or insolvency, a separate property in the annuity which she might employ at her discretion in the support of herself and her husband. Any other construction would be irrational and absurd; for, besides disappointing what was the obvious intention of the

* Correctly stated in Mr. Belt's note, 3 Br. C. C. 383.

[Stanton *v.* Hall.—2 Rus. & Mylne, 175.]

donor, it would render the clause of limitation over absolutely null. The conveyance made by John Hall the younger to the plaintiff, was *ipso facto* void; and, by the express provision of the will, operated as a forfeiture of all his interest, for the benefit in part of the wife; but what would that forfeiture and the limitation over avail, if the partial interest thereby vested in her, were to be instantly re-transferred to the husband, in order to become once more, by a sort of equitable fiction, the subject of his original assignment? Nothing could be more directly adverse to the avowed purpose of the testator.

Sir E. Sugden, in reply.

December 14.—The Lord Chancellor said it was clear that no particular form of words was necessary in order to vest property in a married woman to her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the provisoes annexed to the gift; as where, for example, the direction was that the property should be at the wife's own disposal, or that her receipts should be a good discharge; circumstances which raised a manifest implication that the marital right was meant to be excluded. In the present case, however, nothing appeared upon the language or limitations of the will, from which such an inference could be safely drawn, and a receiver must therefore be appointed.

January 21, 22, 1831.—The cause was brought on again, for the purpose of having it determined how far Mrs. Hall was entitled to claim a settlement out of the annuity; a point which had been postponed till the decision of the general question.

Sir E. Sugden and Mr. Ching, for the plaintiff, submitted, that as this was an annuity given to the wife for her husband's life only, and not a principal sum of money vesting in her absolutely, it fell clearly within the principle laid down by Sir J. Leach in Elliott *v.* Cordell, 5 Mad. 149, and 1 Rus. 71, note, a case less strong than the present, inasmuch as the wife there took an interest in the dividends of the stock bequeathed, during the continuance of her own life, whereas here the 100*l.* annuity was only given her for the life of her husband.

Mr. Knight and Mr. K. Parker, *contrà.*

Till that case was decided, the rule was laid down broadly, that the wife's equity for a settlement out of her *choses in action* must invariably prevail against assignees for valuable consideration, Pope v. Crashaw, 4 Bro. C. C. 326, and it is impossible to suggest a reason why it should not apply to a life interest in such property as well as to interests of a larger description. Elliott *v.* Cordell first attempted to introduce the distinction, for which no previous authority can be cited, and which is entirely at variance with principle. The notion that a husband, by maintaining his wife, becomes, as it were, a purchaser of her life estate, and, therefore, capable of assigning it, was suggested in Pryor *v.* Hill, 4 Bro. C. C. 139, before Lord Alvanley, but without success.

Elliott *v.* Cordell merely decided that the court would not, at *the suit* of a married woman, compel a settlement out of *choses in action* bequeathed to her for life, against the particular assignee: but the reasoning on which the judgment proceeds would justify a contrary decision in the present

[Stanton *v.* Hall.—2 Rus. & Mylne, 175.]

case; for the Master of the Rolls drew a marked distinction between an assignment by the husband to a purchaser for value, *before* he had failed in supporting the wife, and the general assignment in bankruptcy, from which his incapacity to support her followed as a necessary consequence. Here, the very act by which the title of the plaintiff was created constituted a forfeiture on the part of the husband, and deprived him of the means of maintaining his wife; so that the plaintiff is to be considered rather in the light of a general than a particular assignee.

January 24.—The Lord Chancellor:—This case involves the question how far a married woman, to whom an annuity for life was bequeathed in terms which have been adjudged not to vest it in her as her separate estate, is entitled to claim a settlement out of it, against one who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And as Elliott *v.* Cordell, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities; and I find no warrant for supposing that Elliott *v.* Cordell introduced any new doctrine upon the subject. The same doctrine, in principle, was recognised long before by Sir W. Grant, although, undoubtedly, neither in Mitford *v.* Mitford, 9 Ves. 87, nor in Wright *v.* Morley, 11 Ves. 12, was the point raised and disposed of formally. It was, however, repeatedly referred to in those cases; and it is perfectly plain, from the language there used, that the opinion of Sir W. Grant would have excluded the wife's claim as against particular assignees. If the question were now for the first time raised, whether courts of equity had not gone farther than principle warranted, in allowing the claim against particular assignees, in cases where a capital sum was at stake, some doubt might, perhaps, be entertained; but in a case like Elliott *v.* Cordell, where the question related to a mere life interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the Vice-Chancellor would have gone a great step farther, had he listened to the argument in favour of the wife's equity.*

Reg. Lib. B. 1830. f. 917.

* In Lumb *v.* Milnes, 5 Ves. 517, where a wife was declared to be entitled for life to the interest and dividends of a fund, a settlement was directed out of it, against the husband's assignees: so also in Brown *v.* Clark, 3 Ves. 166, and Jacobs *v.* Amyatt, 1 Mad. 376. n.

Tyler *v.* Lake.

2 *Rus. & Mylne*, 183.

Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim;* and as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use.

August 13, 1831.

BY a settlement executed in August, 1825, the Honourable Catharine Tyler, widow, conveyed certain estates to trustees and their heirs, upon trust, immediately after her decease, to sell and dispose of the said estates, and after paying off the incumbrances affecting the same, to stand possessed of the surplus produce of such sale, and of the rents and profits in the meantime, upon further trust, to distribute the residue of the moneys to arise therefrom, among all the sons and daughters of the said Catharine Tyler, namely, John Tyler, Catharine, the wife of John Cooke, Betty Maria, the wife of John G. Anthony, Barbara Tyler, William Tyler, Caroline Tyler, Mary Jane Tyler, and Caroline Ann Tyler, if all of them should be then living, in equal proportions, share and share alike, but subject to the limitations and declarations thereinafter contained concerning the same respectively, (that is to say,) as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, "in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit, in case they should respectively be living at the time of the decease of the said Catharine Tyler, or the time of payment or distribution of the said moneys;" but in case either of them should be then dead, then the share of such of them as should be then dead should be payable to their respective husbands, the said John Cooke and John G. Anthony, if then living, "to and for their own respective use and benefit absolutely;" but in case they or either of them the said John Cooke and John G. Anthony should also have departed this life, leaving lawful issue by their said respective wives, then their respective shares were directed to go over and be paid to and among their children respectively in manner therein mentioned. By subsequent clauses in the settlement, the shares of the four unmarried daughters were directed to be laid out in the funds, or on mortgage, and the dividends and interest to be paid and applied to them or their assigns, "to and for their own proper and respective use and benefit," during their respective lives, with a power of appointment by deed or will. The share of the son, John Tyler, was in like manner directed to be invested, and the interest and dividends to be paid to him "for his own proper use and benefit," with certain remainders over in trust for his children. And lastly the share of the other son, William Tyler, was directed to be held by the trustees upon trust to "pay the same into the proper hands of the said William Tyler, to and for his own use and benefit," in case he should be living at

the death of the settlor; but if he should be then dead, his share was to be invested upon certain trusts for the benefit of his wife and family as therein mentioned.

Upon the death of Mrs. Tyler, the settlor, a bill was filed to carry into effect the trusts of the settlement, and under a reference directed by the decree, the Master reported that Betty Maria, the wife of John G. Anthony, was entitled to one-eighth part of the money which should be produced by the sale of the said estates, and to have one-eighth part of the intermediate rents and profits paid to her, into her own-proper hands, for her own use and benefit. To this report the assignees of John G. Anthony, who had, in the meantime, become a bankrupt, took an exception, on the ground that the bankrupt was entitled to the said one-eighth share of the produce and rents, in right of his wife Betty Maria, and the Vice-Chancellor allowed the exception, 4 Sim. 144, where the settlement is set out more fully.

Mrs. Anthony appealed from that decision.

Mr. Pepys and Mr. Girdlestone, for Mrs. Anthony, contended that, looking as well to the general frame of the settlement, as to the very special nature of the proviso which accompanied the trust for the married daughters, there could be no reasonable doubt of the donor's intention to exclude their husbands from acquiring any interest in the settled property so long as those daughters were alive. This was clearly to be inferred from the subsequent limitation in the deed, whereby the husbands, in the event of their surviving, took by express gift the identical interest in the property which had been previously limited to their wives. Stanton *v.* Hall, 2 Rus. & Mylne, 175, had been strongly relied upon in the court below as negativing such an inference; but that case did not, like the present, contain a distinct clause, that the share of the wife should be paid into her own proper hands, to and for her own use and benefit. If any doubt remained upon the effect of the successive limitations, that clause must completely remove it. A gift to a married woman, to be paid into her own proper hands, could have no other possible meaning than that the payment should be made personally to her, and that the right to receive it should vest in her to the exclusion of her husband. Hartley *v.* Hurle, 5 Ves. 450.; 18 Ves. 434, was a direct recognition of the principle. Hovey *v.* Blakeman, 9 Ves. 524; Lumb *v.* Milnes, 5 Ves. 517. It followed, as a necessary consequence, that she, and not the husband, was the person competent to give receipts to the trustees, a direction which had always been held to vest a separate estate in the wife. The subsequent words, "to and for her own use and benefit," would, if that were required, come forcibly in aid of the construction given to the preceding passage; Adamson *v.* Armitage, 19 Ves. 416.; Coop. C. C. 283.; Tyrrell *v.* Hope, 2 Atk. 558; Wills *v.* Sayer, 4 Madd. 409; and Roberts *v.* Spicer, 2 Rop. H. & W. 157—65, Jac. ed., which apparently deny the effect of the word "own" in a gift of this kind, turned upon the fact that there the testators plainly showed, from the language of other parts of the instrument, that they did not mean to use it in a strict sense. It was unnecessary to go through the cases, which were all ably collected in Roper, 3 Atk. 399; but as to this case see 3 Bro. C. C. 384; but the general doctrine to be extracted from the whole was this, that the court would infer an intention to exclude the husband from any circumstances or expressions which were inconsistent with the full enjoyment of the marital rights. Darley

v. Darley, 3 Atk. 399; but as to this case see 3 Bro. C. C. 384. Wagstaff *v.* Smith, 9 Ves. 520.; Dixon *v.* Olmius, 2 Cox, 414.

Sir E. Sugden, Mr. Knight and Mr. James Campbell, who appeared on the other side, were not called upon to support the decree.

The Lord Chancellor:—The decision in Stanton *v.* Hall, referred to in the court below, was not come to without grave consideration; and it would stand unimpeached even if the judgment now under appeal were to be reversed. That decision has no application at present, except in as far as it sanctions the doctrine, that if a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument: to that extent it is an authority for excluding any positive inference which might be drawn from the words here relied on,—"as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit."

This clause is materially different in its expression, and may be said to be more exclusive than the language of the will in Stanton *v.* Hall. It consists of two parts, the direction to pay the rents and profits into their own proper and respective hands, and the direction that the payment shall be for their own respective use and benefit.

With regard to the latter, I can easily understand the argument that the word "own" may at one time have been held in law to be synonymous with "sole:" but after it has been solemnly decided, as it was by the present Master of the Rolls in Wills *v.* Sayers, and Roberts *v.* Spicer, that that expression standing alone is not sufficient to exclude the marital right, and that in this respect "sole" is a phrase of greater efficacy, I should hold it to be a less sound principle of construction to return to what may have been the old rule, than to adhere to the authority of these modern cases.

Neither do I think that the direction which is superadded,—"to pay the shares into their own proper hands,"—either taken singly or in connection with the rest of the clause, is sufficient to create a separate estate in the wife. The only authority cited for such a proposition is Hartley *v.* Hurle, which was a case under peculiar circumstances, and in which that was not the point principally considered. It is entirely a mistake to suppose that Lumb *v.* Milnes decided any thing of the kind. The rule laid down long ago by Sir H. Grimston, when he said in a case somewhat similar, Dakins *v.* Berisford, 1 Ch. C. 194, that where there were no negative words in the will to exclude the husband, he could not deprive him of his legal rights,—a principle distinctly recognized in Wills v. Sayers and Roberts *v.* Spicer,—is directly opposed to the construction here contended for. I take the principle, therefore, to be now thoroughly established, that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should be so excluded.

If these be the principles that regulate the construction of a will, how much more forcibly ought they to apply to a case like the present, of a limitation contained in a deed? I have looked into the authorities referred to of Hovey *v.* Blakeman, which bore some resemblance to the case at bar, and Wagstaff *v.* Smith, where the bequest was to the wife,

independent of her husband; but in these and in all the other cases, expressions will be found introduced which exclude the marital right in express terms, by giving the property to the wife's separate use; or, (what has been held to amount virtually to the same thing,) the donor annexes some direction or condition to the gift,) in a manner incompatible with the existence of the husband's right. Of this nature are the phrases "to be at the wife's own disposal," or, "to be enjoyed independent of the husband," or, "her receipt to be a good discharge." But here the rents may be directed to be paid into the proper hands of the wife, and yet she may be incompetent to give a receipt to the trustees. Probably the words were used without any very distinct perception of their meaning:* "proper" is the Latin form of the word "own," and can mean nothing more.

On the principle, then, which requires the husband to be excluded by expressions that leave no doubt of the intention, and which forbids the court to speculate on what the probable object of the donor might have been, and not on the authority of Stanton *v.* Hall, unless in as far as it sanctions that doctrine, I have no hesitation in affirming the Vice-Chancellor's judgment.

Fenner *v.* Taylor.

2 Rus. & Mylne, 190.

A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held, (reversing the decision of the court below,) that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver.

February 8, 9, 1831.

THE circumstances under which the question in this case came before the court, are correctly stated in Mr. Simons's report, vol. i. p. 169.

The Vice-Chancellor having decided that the agreement of the husband enured for the benefit of the children, and that the wife was incompetent to waive it, an appeal was brought from his Honour's judgment.

Sir E. Sugden and Mr. Roupell, for the appeal, observed, that there were two points to be considered: first, whether the agreement which formed the basis of the proposed settlement was a contract binding upon the husband; and next, supposing it to be so, whether it could be waived by the wife, who was now willing that the fund to which it referred, should be paid to her husband. The first point depended upon the effect of a voluntary agreement by a husband with his wife, made after marriage, and before any decree had been pronounced, affixing to the instrument a

* It is to be observed, that this opinion derives confirmation from the language of the gift to William Tyler, although his lordship did not advert to that circumstance in his judgment.

[Fenner *v.* Taylor.—2 Rus. & Mylne, 190.]

particular construction, or directing it to be carried into execution. The precise question was decided by Sir W. Grant, upon this identical agreement, but with reference to another portion of the fund; for on the 8th of July, 1813, an order was made at the Rolls, whereby it was directed that a legacy of 3000*l.* should be paid to the husband, after an affidavit had been read to the court, stating that there was no settlement, or agreement for a settlement, unless the paper writing here referred to was to be construed as such.* In this conflict of opinion between two eminent judges, it became necessary to consider how the matter stood upon principle. In an ordinary case, the agreement would be of no value, and could not be executed, inasmuch as it contained no precise or sufficient description of the property to be settled. It was, besides, an instrument purely voluntary, and though it might possibly be enforced against the grantor, if made in favour of parties for whom there was a moral obligation to provide, such as a wife or children, still it could not be carried beyond the actual terms expressed in it, and these referred solely to the wife, who being alone interested would surely have a right to forego the benefit if she pleased. In point of fact, the wife never accepted, and she now distinctly repudiated it; and if she took nothing under the agreement, much less could her children, whose only claim was derived through her, and who were never within the contemplation of the parties. The case of *Ex parte* Gardner, 2 Ves. Sen. 671, relied upon in the court below, was very different in its circumstances, and had no application. That was the case of a husband undertaking to settle an estate of his own upon his wife and family in strict settlement, in consideration of obtaining the wife's property. The proposals, signed by both parties, had been carried in before the Master, and the court would not afterwards permit the husband to escape from his engagement, by accepting the waiver of the wife. The children were there provided for in express words: whereas here the memorandum was confined strictly to the wife, for whom only, therefore, the settlement (which would be to her sole and separate use) could be enforced. The Vice-Chancellor apparently considered this agreement as substituted for the wife's equity, and thence he drew an inference that the benefit of a settlement, made in pursuance of it, ought to be extended to the children of the marriage. But if it were a mere substitution, his Honour's argument was inconsistent: for as a wife may clearly waive the benefit of her equity for herself, up to the last moment before the order for the settlement has been pronounced, and by doing so will defeat the equity of her children; the waiver of this agreement by the wife ought of course to be equally effectual against the interests alleged to be created by way of substitution for that equity, Murray *v.* Lord Elibank, 10 Ves. 84, and 13 Ves. 1.†

Mr. Treslove *contrà*, in addition to the cases cited on the former argument, relied upon Barker *v.* Lea, 6 Madd. 330, as an authority to show that a married woman having once asserted her equity to a settlement cannot afterwards be permitted by any act of hers to destroy the rights

* Reg. Lib. 1812. A. fol. 939, under the name of Fenner *v.* Thompson.

† Where, however, the wife was a ward of Chancery, and the husband, after being committed for a contempt in marrying her, was liberated on undertaking to make a specified settlement, the court would not afterwards allow the wife to waive it, Stackpole *v.* Beaumont, 3 Ves. 89.

which her claim has vested in her children. Scriven *v.* Tapley, 2 Eden, 337; Steinmetz *v.* Halthin, 1 G. & J. 64.*

The Lord Chancellor:—Before delivering my decision upon the question before me, it may be proper first to say a few words respecting the cases of *Ex parte* Gardner and Murray *v.* Lord Elibank, because considerable reliance was placed on the former, and because the reported judgment of Sir W. Grant in the latter contains a remark which would seem to set Lord Hardwicke and Lord Eldon at variance. Upon looking into the report of Murray *v.* Lord Elibank, 10 Ves. 84, when the cause first came before Lord Eldon, we find his lordship laying it down clearly that although the wife, if she please, may call for a declaration that she is entitled to a provision out of the fund for herself and her children, it is nevertheless competent to her, even after an order for a settlement is completed, to waive that equity for herself and her issue. If a settlement be insisted upon, it must be for the benefit of the children as well as of the wife, but (to use his lordship's words) "if the issue have a right against the father, it is dependent altogether on the will of the mother." In a subsequent stage of the same cause, Sir W. Grant observes, "It seems to be assumed in the argument both here and before Lord Eldon, that it was competent to the mother to waive the settlement at any time, before it was actually completed: that is, even after a proposal given in by the husband. Lord Hardwicke, however, determined the contrary, stating, that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply to this case; as, I believe, no proposal was laid before the Master in this case." 13 Ves. 5, 6. When we refer to what Lord Eldon says, he certainly does not state in terms that if the proposal had been carried in, it might still be waived, although his language seems capable of that construction. But with respect to *Ex parte* Gardner, to which Sir W. Grant refers, as a contrary determination of Lord Hardwicke, it is quite unnecessary for me to impeach the authority of that case, for it differs most materially from the case at the bar, inasmuch as the proposals, which had there been signed by both parties, and sent in to the Master, expressly included a settlement on the family; a circumstance which of itself forms a marked distinction.

Without adverting to the grounds upon which his Honour rested his judgment in the present case, it is certain that the very question now submitted to the court has been already decided by his learned predecessor, and in this identical cause. His Honour, it is true, was not aware of that decision, for the language of his judgment is, "It is said, that a case *like* the present came before Sir W. Grant, and that he permitted the wife to waive the agreement: but the case not being in print, I am neither acquainted with the particular facts of the case, nor with the reasons upon which Sir W. Grant proceeded." 1 Sim. 172. With those facts, however, I am now fully acquainted. Instead of 270*l.*, the sum which is here in contest, the sum on the former occasion was of much larger amount; and all the circumstances which exist here, namely, the communications that took place with Taylor, and the memorandum

* Where the children have been omitted in the settlement directed by the court, the omission, if it has been long acquiesced in, will not be supplied after the wife's death, Johnson *v.* Johnson, 1 J. & W. 479.

[Fenner *v.* Taylor.—2 Rus. & Mylne, 190.]

of the 22d of December, 1810, which has been rather incorrectly described as a contract, being the memorandum which formed the foundation of the wife's equity, and which, it was said, she could not waive, must have been the very ground of Sir W. Grant's judgment. I must presume, therefore, that the exact question now before me was formally submitted to Sir W. Grant, and by him decided in the affirmative; and, consistently with that decision, I feel myself bound to reject the construction which his Honour has put upon this agreement.

The judgment pronounced upon that occasion, coming, as it did, from the same eminent judge who had so recently considered the whole of this subject in the latter stage of Murray *v.* Lord Elibank, is entitled to no ordinary weight; more especially when it is recollected that Sir W. Grant carried the respect due to voluntary conveyances to its utmost limits, and that his decision in Sloane *v.* Cadogan* pushed that doctrine at least as far, perhaps I might say farther, than any of the preceding authorities had gone. Upon these grounds I am of opinion that the order of the court below must be reversed.

February, 1833:—The cause came on again at the Rolls, upon a petition praying that another portion of the same fund might be paid out to the husband with the consent of the wife. On that occasion, the proceedings which had taken place before the Lord Chancellor were stated to his Honour, who expressed a wish that the petition should stand over, in order that he might consider the point farther, and have time to look into the authorities.

March 12:—The Master of the Rolls, in acceding to the prayer of the petition, observed, that when he refused the former application he was not aware that the precise point had been already decided by Sir W. Grant, in this very cause, in favour of the wife's right to waive a settlement founded on the identical agreement here in question, and that that fact was first brought to his knowledge by the judgment of the Lord Chancellor. Whatever, therefore, his own individual opinion might be or might have been, he felt himself bound, on a petition like the present, which was by the same parties, and arose out of exactly the same circumstances, to follow the decision pronounced by his lordship, and to permit the husband, with the consent of the wife, to receive the benefit of the fund now in question. Nevertheless, the reasons upon which he had formerly come to a different opinion (and to that opinion he still felt disposed to adhere) appeared to him to be of considerable weight, and he thought it his duty to re-state them. In his view of the case, as the particular form of the settlement was not specified in the memorandum, a Court of Equity, if it were called upon to execute the agreement, would direct a settlement to be made in the ordinary form of marriage settlements; and the children, consequently, would be entitled to a benefit conformable to the usual course in such settlements. Although the Lord Chancellor and Sir W. Grant appeared to have considered that the agreement here was merely voluntary, and that a Court of Equity would not carry it into effect, it amounted, as it seemed to him, to a purchase, by the husband, of the wife's equity to a settlement, and could not be regarded as a mere voluntary instrument. His Honour added that, upon looking

* Sugd. V. P. Appendix, 817.

into the reports with a view to authorities upon this subject, he had found a case which was exactly in point, Blois *v.* Lady Hereford, 2 Vern. 501; Lloyd *v.* Williams, 1 Madd. 450, where it was expressly laid down that, under such circumstances, a husband was a purchaser of his wife's equity; and in his opinion, therefore, the agreement of Mr. Fenner was not without consideration.

Woodmeston *v.* Walker.

2 *Rus. & Mylne*, 197.

A testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation.

February 15. August 12. 15, 1831.

THE testator, Henry Watson, disposed of one-third part of his residuary estate in the following manner: "One other full and equal third part thereof I hereby direct to be laid out by my executors in the purchase of a government annuity for the life of my sister Rebecca Woodmeston; which annuity so to be purchased I hereby give and bequeath unto my sister Rebecca, to and for her own sole and separate use and benefit, and independent of any husband she may happen to marry; and I direct that her receipt or receipts, notwithstanding her coverture, shall be good and sufficient discharge and discharges for the same, and to be for her personal benefit and maintenance, and without power for her to assign or sell the same by way of anticipation or otherwise."

Rebecca Woodmeston was a widow at the date of the will, and had continued so ever since; and she filed the present bill, praying to have it declared that she was entitled absolutely to the one-third part of the testator's residuary estate.

Mr. Bickersteth and Mr. Bacon, for the plaintiff:

It is an established principle of the court, that where an annuity is directed to be purchased, and the annuity, if purchased, might be immediately sold by the person to whom it is given, the annuitant is entitled to take the value of the annuity, without going through the form of purchase. In this case the annuity, if purchased, might be sold by the plaintiff; for the clause against sale and anticipation is void, inasmuch as the plaintiff, at the time of the will and of the testator's death was, and still is a single woman. In the case of a bequest to a male, a restraint on alienation is of no effect unless the property be limited over, Brandon *v.* Rob-

inson, 18 Ves. 429; and the restraint, when imposed on a married woman, ceases as soon as the coverture is at an end, Barton *v.* Briscoe, Jac. 603.

Mr. Pemberton, *contrà:*

In Barton *v.* Briscoe the will contemplated no marriage except that which was actually subsisting; and the opinion of Sir Thomas Plumer can be maintained only on the ground that it was not the intention of the testator to extend the restriction to future coverture. Here it is a future marriage which is guarded against. If alienation may be restrained in the case of actual coverture, why may it not be restrained prospectively with a view to future coverture? The testator has sought to throw a certain protection round the object of his bounty, in the event of her afterwards marrying; and the court is now called upon to defeat his intentions entirely.

The Master of the Rolls:—In the case of Barton *v.* Briscoe the restraint against alienation was, by the terms of the settlement, applied only to the actual coverture with the settler which subsisted at the time, and it necessarily determined, therefore, upon his death. Here the restraint applies to the coverture with any husband whom the annuitant may happen to marry.

If the plaintiff had been actually married at the death of the testator, it is admitted that the restraint would have been good; and the question is, whether a testator can impose such a restraint with respect to a future marriage? At law a wife can have no separate estate; and it is only by the principles of a Court of Equity that such an estate is permitted, for protection against the legal rights of the husband. To give full effect to that protection, the rule in equity permits a restraint upon the power of disposition, which would be invalid in any other case; and I cannot satisfy myself that there is any substantive distinction between a present coverture and a future coverture. It is a familiar case, that where the interest of a legacy is given to an unmarried female for life, to her separate use, in case of coverture, and the power of sale or anticipation is restrained, then, in case of a future marriage, and a sale or anticipation of the interest during the coverture, this court holds that sale or anticipation void, although by the terms of the will the life-interest of the legatee is not limited over upon that event; and no right accrues by the prohibited act to any other person. That doctrine applies to the present case, where one argument is, that the plaintiff is solely interested in the annuity.

Upon the whole, in the absence of authority to support the claim of the plaintiff, I am not prepared to say that, upon the doctrines of this court, the power of disposition which is incident to property may not be restrained in the case of the future marriage of a female who is single at the time of the gift.

The plaintiff, Mrs. Woodmeston, appealed from his Honour's decree, dismissing the bill.

Sir E. Sugden and Mr. Bacon, for the plaintiff:

If the bequest of the annuity stood alone, the plaintiff's right to insist upon receiving the fund itself, in lieu of the annuity to be bought with it, would be indisputable; for the recent decision in Dawson *v.* Hearn, 1

Russ. & M. 606, where all the authorities were considered, has set that point at rest. The only doubt is, whether the clause against anticipation can effectually control this right, because the legatee happens to be a female, although she is unmarried and of full age. The case of Dawson *v.* Hearn went some way towards deciding that point also; for the argument drawn from the obvious purpose to secure a permanent provision for a widow, instead of giving her a gross sum, would apply equally in the present instance, and was there urged without success; although it must be allowed that the purpose of this testator is most strongly indicated, by the anxiety with which the language of his will has guarded against any imprudent wasting of the fund. But admitting the intention to be clear, the inquiry remains, Has the testator resorted to the proper means for carrying that intention into effect? How stands the matter upon principle? At law, every person who acquires an estate must take it with all its incidents; and one of the most essential incidents to the right of property is the power of alienation, which no clause or proviso can restrain or take away. And the same principle has been repeatedly recognised in equity; Brandon *v.* Robinson, 18 Ves. 429; and 1 Rose, 197. The object, therefore, can only be attained indirectly, by annexing the prohibited act as a condition, upon the happening of which the original estate is to determine, and a new estate to vest in another party. Without such a gift over, the strongest words of prohibition are ineffectual.* The doctrine introduced by courts of equity with respect to the interests of married women, so far from being an infringement of the principle, are perfectly consistent with it, and supply neither argument nor analogy in favour of his Honour's judgment. Lord Eldon, following Lord Thurlow, held that the interest which a married woman took in property settled to her separate use, was purely the creature of equity, which this court was therefore at liberty to mould and deal with, as might be deemed best for her advantage, or most agreeable to the wishes of the donor. Accordingly, with respect to property which is so settled, the court considers the wife as a *feme sole*, notwithstanding her coverture, and there, the restriction on alienation is allowed; whereas here, the plaintiff being a *feme sole*, and of course *sui juris* at law, the power of the court is not required for her assistance or protection, and the restriction cannot be effectually imposed. The very point was decided in Barton *v.* Briscoe, Jac. 603, where Sir T. Plumer held that the restraint on anticipation by a wife ceased upon the husband's death; and that decision was approved and followed by Lord Gifford. It may be said, that as the words of this proviso point to any future coverture, the restriction will attach upon the plaintiff the instant she marries a second husband, and that the court looking to that contingency, will protect the executors in their refusal to transfer the fund. For such a proposition, however, no authority can be adduced. The language of the judgment in Barton *v.* Briscoe is directly opposed to it, and the existence of a desultory and shifting fetter of that description is repugnant to legal principle, and would be attended with much practical inconvenience.

Mr. Pepys and Mr. Kindersley, for the executors:

After the decision in Dawson *v.* Hearn, it is too late to contend that executors have in general a right to invest the fund bequeathed for the

* Lear *v.* Leggett, 1 Russ. & M. 690, and the cases there cited.

[Woodmeston *v.* Walker.—2 Rus. & Mylne, 197.]

purchase of an annuity, in defiance of the express wishes of the annuitant. But this is a peculiar case. The legatee is a female, and the clauses prohibiting anticipation, and excluding the rights of any future husband, prove it to have been the testator's settled purpose that an annuity should be purchased for his sister at all events. It is true, that where a father is anxious to deter his daughter from making an imprudent marriage, he may declare that, upon the happening of the apprehended event, the property which he bestows on her shall go over; but frequently this will not answer his purpose, for if, notwithstanding the forfeiture, the forbidden marriage takes effect, his child will be left destitute. For this reason clauses against anticipation are constantly introduced into settlements, which are intended to provide for females; and no distinction is ever taken with reference to the fact of their being married or single. The practice of conveyancers, who expressly exclude the control of any after-taken, as well as of any present husband, and the language of judges who have considered this subject, equally countenance the restriction in both cases;* it being a relaxation of the strict rule of law, grounded simply on the sex and condition of the party, which call for extraordinary protection against the importunities and influence to which coverture, whether present or prospective, may expose her. In Barton *v.* Briscoe, the prohibition was confined to the then subsisting marriage, and the judgment only decided, what nobody disputes, that, in the absence of a special restriction, a *feme sole* stands in the same situation as a male. It is not to be denied that the instrument, whether deed or will, might divide the quantity of interest given into periods, so as indirectly to effect the desired result,—by limiting it, for example, to the party so long as she continued a *feme sole*, with a direction that when she became covert it should vest, *toties quoties*, in trustees for her separate use, without power to anticipate. In substance that is done here. The plaintiff, therefore, would have power to dispose of her annuity till her marriage, and the instant that event took place the restraint upon anticipation would attach.

It is quite immaterial, however, whether a shifting restriction of this kind is, or is not effectual; for the real question for the court is, what was the intention of the testator, as it is to be inferred from these peculiar provisions? There is nothing which prevents a testator from imposing it, as a necessary condition of his bounty, that the gift shall be taken in whatever form and mode his prudence or caprice may dictate; provided only he express his purpose with sufficient clearness. Here it is impossible to doubt that the ruling idea in the testator's mind was, to secure to his sister for her life a competent and permanent provision, which should give her no trouble in the management, which she should have little temptation to dissipate, and of which no after-taken husband should be able to deprive her.

August 15.—The Lord Chancellor:—The question in this case is, whether a prohibition against anticipation, annexed to a provision bequeathed to a woman for her separate use, notwithstanding any coverture, and she being at the time and still continuing unmarried,—whether that prohibition so modifies the nature of the property bequeathed, as to render the interest which she takes incapable of being aliened?

* See what is said by the judges in Beable *v.* Dodd, 1 T. R. 193, a case which was not cited.

[Woodmeston *v.* Walker.—2 Rus. & Mylne, 197.]

The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the interest given, is precisely the same, I apprehend, in personal as in real estate. Thus, where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it, as to create in the donee a life-estate which he may not alien: although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done; for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual. If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee, and create a new interest in another. In none of the cases bearing upon this subject (and they are very numerous) can any warrant be found for the proposition, that at law an inalienable estate can be created without any gift over. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture.

In this court it has been held, that where property is given to a married woman to her sole and separate use, alienation may be prohibited in respect to the property so settled, without annexing any limitation over, to operate by way of defeasance of the first estate; and the ground on which that has been supported by Lord Eldon and Lord Thurlow appears to be clearly consistent with itself and with legal principle, but to have no application to the present case.

Baron and *feme* being one person in law, no separate estate could at law be enjoyed by the wife against the husband, so as not to be liable to his engagements or control. Nor was it till after a considerable struggle (as appears from the language of Lord Cowper in Harvey *v.* Harvey, 1 P. Wms. 125), that courts of equity ventured to introduce a different doctrine, and to hold that personal chattels might be so given to a married woman as to vest in her alone, to the entire exclusion of her husband. That doctrine, however, has now been long established, insomuch that it has in later times become a regular mode of settling property on a *feme covert*, to convey it by such a form of words as shall expressly exclude the marital right, and place her, in respect of that property, exactly in the condition of a *feme sole*.

As the separate estate of the wife was thus the invention of equity, it followed, that the same court which invented, might mould and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which in the case of a *feme covert* equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner. And it is strictly in accordance with the same principle that equity allows such restrictions to be imposed on the separate interest thus given, as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit. It was upon this ground that a proviso prohibiting the wife from aliening her separate estate, or a clause against anticipation, as it has been called, was first introduced in Miss Watson's settlement: upon this ground the validity of such a proviso

[Woodmeston *v.* Walker.—2 Rus. & Mylne, 197.]

has been recognised by Lord Thurlow,* and subsequently upheld by Lord Eldon in Jones *v.* Harris, 9 Ves. 486, and various later cases; and it is now perfectly well established that, with respect to personal estate settled to the separate use of a married woman, a clause against anticipation will be effectual so long as the coverture continues. No authority, however, can be found for the position, that a *feme sole* may be tied up and restricted in the dominion over her property, any more than a male, who is clearly incapable of being so restricted. The operation of the clause against anticipation, where there is no limitation over, rests entirely on its connection with the coverture, and on its being applied to a species of interest which is itself the creature of equity. The present is not a case where there is a coverture, but a possibility only of coverture; and it would be going farther than the authorities warrant, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest conveyed to the separate use of a *feme sole* (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply because at some after period she might possibly contract a marriage.

It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless, perhaps, by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures. But it is unnecessary to consider that question, as no such contrivance has been resorted to in this case. Here the bequest is merely coupled with a naked prohibition against alienation by the legatee. The decision in Barton *v.* Briscoe, where there had been a coverture, which was determined, proceeds strictly upon the principle adverted to; and upon the authority of that case, as well as the general principle and reason of the thing, I have no hesitation in stating that my opinion differs from that of the Master of the Rolls; and I must therefore hold that the plaintiff takes, at her election, an absolute interest either in the one-third share of the testator's residuary estate, or in the annuity to be purchased with that share.

On a subsequent day his lordship decided that, in conformity with Jenour *v.* Jenour, 10 Ves. 562, the costs of the suit should be borne by the plaintiff's share, as that formed a distinct fund, clearly severed from the bulk of the residue.

* See Pybus *v.* Smith, 3 Bro. C. C., and Parkes *v.* White, 11 Ves. 221.

Jones *v.* Salter.*

2 *Rus. & Mylne*, 208.

Bequest of dividends of stock to a *feme covert* for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof: Held, that the legatee, on becoming discovert, might validly dispose of her entire life-interest.

May 25, 1815.

MARY BAKER, by her will dated 14th of January, 1802, gave to the defendant, her executor, 2000*l.*, four per cents, in trust, as to 1000*l.*, to permit the plaintiff, Joshua Jones (since deceased, to receive the dividends for his life, and after his decease, in case the plaintiff, Ann Jones his wife should survive him, in trust that she should receive the dividends for her separate use for her life; and as to the other 1000*l.*, upon trust to pay to or authorize the plaintiff Ann Jones to receive the dividends thereof for her life for her separate use; "and that the same, as well as the interest, dividends and produce of the said 1000*l.* four per cent bank annuities, so bequeathed in the event of her surviving the said Joshua Jones her husband, should not be subject to the debts, dues or demands, and be free from the control or interference of the said *Joshua Jones, or of any other husband or husbands with whom she might at any time thereafter intermarry, and without any power to charge, incumber, anticipate, or assign the growing payments thereof.*" And the testatrix directed that the receipts of the plaintiff Ann Jones alone for the dividends should be a sufficient discharge: and after her death, in case the said Joshua Jones should survive her, upon trust to permit him to receive the dividends for his life, and after the death of the plaintiffs Joshua Jones and Ann Jones, upon trust to divide the said sums of 1000*l.* and 1000*l.* four per cent bank annuities among their four sons.

After the death of Joshua Jones the husband, this petition was presented by the plaintiff Ann Jones, and the eldest son, who had attained twenty-one, stating that it would be of great benefit to the son to receive his fourth part of the 2000*l.* bank annuities, and that his mother, the petitioner Ann Jones, was desirous of assisting him by giving up her life interest in the fourth part, and therefore praying a transfer of one-fourth part of the said bank annuities; and Sir William Grant, then Master of the Rolls, after some consideration, made an order accordingly.

Some time afterwards a similar petition was presented by the mother and the second son, on his attaining twenty-one, for the like purpose, when a similar order was again obtained from the same judge.

Mr. Treslove, for the petitioners.

* The reporter is indebted to the kindness of Mr. Treslove for the note of this case, in which the point principally considered in Woodmeston *v.* Walker, 2 Rus. & Mylne, 197, was determined in the same way by Sir W. Grant.

Brown *v.* Pocock.

2 *Rus. & Mylne*, 210.

A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy.

May 23. 31, 1833.

ANNE POCOCK bequeathed to the defendants the sum of 6000*l.*, upon trust to invest the money and stand possessed of the trust funds, and the interest and dividends, and apply one-third of such interest, or a competent part thereof, in the maintenance and support of each of the three infant daughters of James E. Brown, and to accumulate the residue until the infants should respectively attain the age of twenty-one, when the whole of the interest was directed to be paid to them for their respective lives in equal shares; and in case any of them should marry, one equal third part of the trust funds was directed to be held in trust for the sole, separate, and particular use of the daughter so marrying during her life, and the dividends and interest thereof to be paid to her accordingly, but not by way of anticipation, for her separate use; and after the decease of such daughter, her share of the trust funds was given to her children in manner therein mentioned; with benefit of survivorship among the other daughters, in case of the death of any of them, without having children who should live to obtain a vested interest in their mother's share.

The testatrix died in 1817; and a suit having been instituted for the administration of the estate, the legacy to the daughters of J. E. Brown was paid into court. Ann Elizabeth Brown, the eldest of those daughters, attained the age of twenty-one on the 9th April, 1832; and in the month of June following, she, in consideration of 400*l.*, advanced to her by John Hovil for the purchase of a redeemable annuity of 40*l.* 10*s.*, assigned to Hovil all the interest which she took under the will of Anne Pocock, upon trust to secure the due payment of the annuity. In the month of October, in the same year, Ann E. Brown intermarried with Samuel Andrews; and Hovil shortly afterwards presented a petition at the Rolls, praying that the amount of his annuity might be ordered to be paid to him out of Mrs. Andrews' share of the trust fund. The Master of the Rolls declined to make any order upon that petition; and Hovil thereupon appealed to the Lord Chancellor.

Sir E. Sugden, for the petitioner:

The decision of this question must be governed by the judgment in Woodmeston *v.* Walker, 2 Rus. & Mylne, 197, where the principle on which restrictions imposed upon property taken by a *feme covert* are upheld in equity, was very fully considered, and where, in strict accordance with that principle, and with the previous cases, your lordship held it to be clear, that unless she be *covert* at the time when the interest vests, and the coverture be continuing down to the moment when the alienation is attempted, a female of full age stands precisely on the same footing with a male, and equally with him may exercise all the rights of ownership,

[Brown *v.* Pocock.—2 Rus. & Mylne, 200.]

notwithstanding a clause against anticipation. The assignment to the petitioner was executed by Mrs. Andrews after she came of age and before her marriage; and it will not be seriously contended, that her subsequent coverture could nullify an act originally valid. Even if the assignment had been made posterior to the marriage, Newton *v.* Reid, 4 Sim. 141, is an authority to show that that circumstance could not give force to a restriction which was nugatory and inept in its creation. In such a case the only mode of effectually preventing alienation is by a clause of forfeiture and a gift over.

Mr. Pepys and Mr. Cooper, for Mr. and Mrs. Andrews:

In Woodmeston *v.* Walker, the legatee was of full age and was a widow, as well at the time when the bequest took effect, as when she asserted her claim to the entire fund; whereas at the death of this testatrix, when her interest in the legacy vested, Mrs. Andrews was an infant, and she is now a married woman. Newton *v.* Reid does not appear to have been much argued, and although that case was decided some time ago, it has only very recently been reported, so that it cannot yet be said to have received the sanction of the profession.

May 31, 1833.—The Lord Chancellor:—The point upon which this case turns, is the effect of a clause of anticipation in a will. The bequest was in trust for the infant daughters of J. E. Brown; a sufficient sum for their education and maintenance to be paid out of the interest till they reached twenty-one respectively; and the whole interest of each share to be paid to each daughter for her life as she reached twenty-one, and in case of marriage then to her sole and separate use, but not by way of anticipation. One of the daughters attained the age of twenty-one in April, 1832, and in June, 1832, executed an assignment of her share of the interest to the petitioner, to secure the payment of a redeemable annuity of 40*l.* 10*s.* granted by her to him, in consideration of a sum of 400*l.*, money lent to her. In October she married; and her husband and she now join in opposing the application made by the grantee of this annuity to have the interest paid under the assignment, or, out of the interest, the annuity, as it becomes due, and they oppose the application on the ground of the prohibition to anticipate. The Master of the Rolls appears to have regarded the matter in this light, for he refused to make an order on the petition. I cannot agree with his Honour. I consider the prohibition quite ineffectual to tie up the fund. There is no gift over; and the legatee was not a *feme covert:* she was not, indeed, a *feme covert*, either at the date of the will, or at the death of the testatrix, or at the date of the assignment. In order to support the view taken below, we must overrule all the cases, particularly Barton *v.* Briscoe, Jacob, 603; at the Rolls, Woodmeston *v.* Walker in this court, and Newton *v.* Reid, 4 Sim. 141, before the Vice-Chancellor.

An attempt is made to distinguish this case from these, but there is not even a probable argument for the distinction. In principle none of them differ, and one of them, Newton *v.* Reid, would be the same to the letter, except that it is a stronger decision than the one I am about to make. The fund was there directed to be invested in purchasing an annuity for an unmarried daughter, to her sole and separate use, in case she married, "but that she should not be at liberty in any way whatever to sell, assign, or in any way dispose of the annuity, or if she did so, such sale to be

[Brown *v.* Pocock.—2 Rus. & Mylne, 200.]

void and of no effect; the testator's intention being, if any accident in life should unfortunately happen to her, that she should be kept from want." She married; and then, jointly with her husband, assigned the fund, electing to take it and not the annuity; and it was assigned for money advanced to the husband. The court held the restraint upon anticipation void, there being no gift over. The particulars in which that case differs from the present make it much stronger; for the prohibition is more particular and elaborate; and the assignment was not made, as here, while the legatee was a *feme sole;* and though the sum in question was considerable, the decision, which was in 1830, has been acquiesced in.

Having gone at large into the principles on which questions of this kind turn, in Woodmeston *v.* Walker, I should not now have entered upon the further discussion of the cases, had it not been contended that there the legatee was not married, whereas she is, in the present case. Upon the principle this can make no difference, the assignment having here been made when she was sole. But in Newton *v.* Reid, this difference did not exist.

ENGLISH

CASES IN CHANCERY.

BEFORE LORD BROUGHAM, CHANCELLOR, AND SIR JOHN LEACH, MASTER OF THE ROLLS.

Limbard *v.* Grote.

1 *Mylne & Keene*, 1.

A daughter being entitled under the marriage settlement of her father and mother to such share and interest in lands and money, as the surviving mother should appoint, provides by her own marriage settlement, that all such share and interest to which she should become entitled, under her mother's settlement, should be vested in trustees to the use of her intended husband for life, remainder to herself for life, remainder to the children of the marriage.

Four years after the marriage, the mother appoints a sum of 3000*l.* to be paid to the trustees of the daughter's settlement, upon the uses therein expressed, in satisfaction of the daughter's share and interest under the marriage settlement of the father and mother: Held, that this was substantially an appointment to the daughter, and therefore valid.

November 13, 1832.

BY the settlement made on the marriage of Henry Peckwell and Bella Blosset, dated the 19th and 20th of February, 1773, certain lands and money were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, in such shares and proportions as the husband and wife should during their lives jointly appoint, or, for default of a joint appointment, as the survivor should by deed or will appoint; and in default of any appointment, to the children as tenants in common in fee.

The husband died, leaving his wife surviving him; there having been no joint appointment.

There were issue of the marriage two children; Robert Henry Peck-

[Limbard *v.* Grote.—1 Mylne & Keene, 1.]

well, afterwards Sir Robert Henry Blosset, and a daughter named Selina Mary. After the death of the father, the daughter intermarried with George Grote, and by the settlement made in contemplation of that marriage, dated the 7th and 8th days of October, 1793, it was provided that all the estate and interest to which Selina Mary should become entitled after the death of her mother, by virtue of the settlement of 1773, should be settled to the use of the husband for life; remainder to the wife for life; remainder to such one or more of the children of the marriage as the husband and wife jointly, or the survivor should appoint; and for default of appointment, to the children equally.

Afterwards, by a deed poll, dated the 23d of December, 1807, Bella Peckwell executed the power of appointment under her marriage settlement, and thereby appointed all the lands and money to which her power extended, to her son, Sir Robert Henry Blosset, to be an immediate vested interest in him, but to take effect in possession after her death, charged with the payment thereout, after her death, of a sum of 3000*l.* to the trustees of her daughter's marriage settlement, upon the trusts, interests, and purposes expressed in the said settlement, and which sum was, by the said deed poll, stated to be appointed and intended to be taken and received in full satisfaction of all the share and interest of her said daughter under the marriage settlement of her the said Bella Peckwell.

The material question in the cause was, whether this appointment of the mother was a valid execution of her power, not being in form, as it applied to the daughter, an appointment to a child of the marriage, but for the benefit also of the husband of the daughter and of the daughter's children, who were not objects of the mother's power of appointment.

Mr. Sidebottom, for the appointees, cited White *v.* St. Barbe, 1 V. & B. 199, where it was held that under a power to appoint among children, interests might be given to grandchildren by way of settlement, with the concurrence of their mother, an object of the power, and her husband. So in Langston *v.* Blackmore, Ambl. 291, an appointment to a son, remainder to such wife as he should marry, remainder to his issue, under a power to appoint to children, was held good, inasmuch as the son might, if the appointment had been made to him absolutely, have immediately afterwards settled the property in the same manner. If, however, the appointment in favour of Mrs. Grote should be held to be bad, then the whole would enure to the benefit of Sir Robert Henry Blosset, in whose behalf the power was well executed. Alexander *v.* Alexander, 2 Ves. sen. 640; Palmer *v.* Wheeler, 2 Ball & Beat. 18.

Mr. Tinney, *contrà*, contended that the appointment was bad, inasmuch as it was an appointment to persons who were not objects of the power. If the appointment were bad, such part of the fund as was ill appointed would go to the children, to whom it was limited in default of appointment. Routledge *v.* Dorril, 2 Ves. jun. 357.

The Master of the Rolls:—The appointment of the 3000*l.* by the mother is substantially an appointment to the daughter, being in execution of the daughter's contract in her marriage settlement, and is therefore a valid appointment.

Piercy *v.* Roberts.

1 *Mylne & Keene*, 4.

A testator bequeathed a legacy of 400*l.* to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner as they should in their judgment and discretion think best: Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent.

In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the defendant to object that the suit has been instituted without the consent of the major part in value of the creditors, as required by the bankrupt and insolvent debtors' acts. The judgment in such a suit will bind the creditors, but the assignees take upon themselves the responsibility that the suit has been properly instituted and properly conducted.

November 5. 12; December 14, 1832.

THOMAS ROBERTS, by his will dated the 18th of January, 1829, bequeathed to his executors the sum of 400*l.* upon trust, to pay, apply, and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of his son, Thomas Jortin Roberts, in such smaller or larger portions, at such time or times immediate or remote, and in such way or manner as they the said executors, or the survivor of them, or the executors or administrators of such survivor, should in their judgment and discretion think best: and, after bequeathing to his executors the further sum of 400*l.* upon similar trusts, for the benefit of his son John Prowting Roberts, the testator proceeded as follows:—"And, in case of the deaths of either or both of my said sons, Thomas Jortin and John Prowting, before the whole of the said several sums of 400*l.* and 400*l.*, and the interest thereof respectively, shall have been paid or applied for the purposes aforesaid, then I will and direct that the unapplied part or parts thereof respectively shall sink into and become part of my residuary personal estate, and go and be applied therewith as hereinafter mentioned:" and the testator thereby appointed his wife, Ann Roberts, his residuary legatee, and the said Ann Roberts and John Jortin executors of his said will.

The testator died in July, 1829, and in May, 1830, the testator's son, Thomas Jortin Roberts, took the benefit of the insolvent debtors' act. Previously to May, 1830, Thomas Jortin Roberts had received several sums from the executors, amounting in the whole to 156*l.*; and since that period, and before the filing of the bill, he had received several other sums, amounting together to 112*l.* The bill was filed by the assignee of the insolvent's estate against the executors of the testator, to recover the legacy of 400*l.* and the interest thereof, or so much thereof as remained unpaid at the time of the discharge of the legatee under the insolvent debtors' act.

Mr. Bickersteth and Mr. Girdlestone, jun., for the plaintiff:

The discretion given by this testator to his executors was a discretion subject to the incidents of property, and consequently terminable by the

[Piercy *v.* Roberts.—1 Mylne & Keene, 4.]

bankruptcy or insolvency of the legatee. The defendants insist that the insolvency of the legatee was an event in the contemplation of the testator, and that upon that event they had a right to exercise their discretion either in continuing or withholding further payment. In point of fact, they have continued to make payments to the legatee after his insolvency. All that it is necessary to consider, therefore, is, whether such an exercise of discretion is permitted by law. Attempts have frequently been made by testators to give property in such a manner as to prevent the use and enjoyment of it from being interrupted by the bankruptcy of the legatee, but such attempts have been uniformly rendered unavailing by the decisions of this court. Brandon *v.* Robinson, 18 Ves. 429; Ross *v.* Ross, 1 J. & W. 154; Graves *v.* Dolphin, 1 Sim. 66. In Graves *v.* Dolphin, your Honour held that the policy of the law does not permit property to be so limited, that it shall continue in the enjoyment of a bankrupt notwithstanding his bankruptcy; and, by parity of reason, the law will not permit property to continue in the enjoyment of an insolvent notwithstanding his insolvency.

Mr. Pemberton and Mr. Elderton, for the defendants:

It is perfectly true, that where a vested interest is given to a legatee, the property so given cannot be separated from its incidents; and this is the circumstance which distinguishes all the cases that have been cited from the present. In Brandon *v.* Robinson, Lord Eldon held the interest given to the bankrupt to be a vested interest, and therefore capable of passing by the assignment under the commission of bankruptcy. To prevent such an effect, he observed, there must have been a limitation over. The same observation applies to Graves *v.* Dolphin, 1 Sim. 66. So in Ross *v.* Ross, 1 J. & W. 154, the interest was to vest when the bankrupt attained the age of twenty-five; and he had, in fact, attained that age. In the present case, there is the very circumstance which, according to the distinction taken by Lord Eldon in Brandon *v.* Robinson, would have prevented the interest in that case from passing to the assignee. There is a limitation over to the residuary legatee, in the event of the whole of the 400*l.* and interest not being paid in the lifetime of the legatee. It is certain that there is no law which prevents a man from so restricting the benefit of a bequest, that it shall cease on the insolvency of the legatee; and why may he not so restrict it that it shall cease at the discretion of the executors? If the law permit a man to limit his property over absolutely on the insolvency of a legatee, what is to prevent him from so limiting it conditionally? The assignee of an insolvent cannot be placed in a better situation than the insolvent himself. As the interest of the legatee, therefore, depended on the discretion of the executors, the interest of the assignee must, in like manner, depend upon that discretion; and the executors have a right to determine the bounty of the testator upon an event which it is reasonable to suppose the testator himself had in his contemplation.

Mr. Bickersteth in reply:

There can be no doubt that a testator may make a limitation over on the insolvency of a legatee; but this the testator has neither done in terms nor in effect. He has made a limitation over in the event of the death of the legatee, which excludes the notion of his having intended to give the legacy over in any other event. This, therefore, is an equi-

table interest vested in the insolvent, which the court will hold to be liable to the claims of the creditors. The executors have, by their own act, shown an intention of giving to the legatee such a personal enjoyment of the legacy after his insolvency as the policy of the law will not allow.

The Master of the Rolls:—The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee; or whether it may remain in the hands of the executors, to be applied, at their discretion, for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment.

A preliminary objection was taken to this suit by the defendants, on the ground that it had been instituted without the consent of the major part in value of the creditors, at a meeting convened by advertisement for that purpose, as required by the 1 G. 4, c. 119. The bill alleged, that the plaintiff had been duly authorized to institute the suit with such consent, but this allegation was not proved; and it was objected at the hearing, by the defendants, that the consent of the creditors not being proved, the bill must be dismissed.

His Honour would not allow the suit to be stopped by this objection, but directed the point to be argued on a future day.

November 12.—On this day the point was accordingly argued by Mr. Bickersteth, for the plaintiff, and by Mr. Pemberton, for the defendants.

For the Plaintiff. The first case in which this point was considered is Ocklestone *v.* Benson, 2 Sim. & Stu. 265; there the defendant pleaded that the suit was not instituted with the consent of the creditors at a meeting, as required by the 5 G. 2. c. 30, ss. 34, 35. It is to be observed that the clause in question is imported from the bankrupt acts into the insolvent debtors' act, and consequently that the cases in which the clause in the bankrupt acts was considered are applicable for the purposes of the present argument. All the reasoning involved in the objection is summed up in the observations made by your Honour in Ocklestone *v.* Benson, 2 Sim. & Stu. 265. "If the creditors are not bound by the result of a suit, which is commenced by the assignees without the consent of the creditors, then it is not fit that the defendant should be vexed by a suit which at the pleasure of the creditors may be to him fruitless; and if the creditors are bound by such a suit, then it is fit that a plea should be favoured which is in furtherance of the statute." In Doe *dem.* Clark *v.* Spencer, 3 Bingh. 207, the Court of Common Pleas held that it was not competent to a defendant in an action of ejectment to take an objection similar to that now made. In Bevan *v.* Lewis, 2 G. & J. 245, your Honour decided that a supplemental bill to a bill filed before the bankruptcy of the plaintiff might be filed without the consent of the creditors, as required by the 6 G. 4. c. 16, s. 88. In Bozon *v.* Williams, 2 Y. & J. 265. 475, the same plea was put in as in Ocklestone *v.* Benson, and it was reluctantly allowed by Chief Baron Alexander on the authority of that case. That learned judge, indeed, expressed some doubt

[Piercy *v.* Roberts.—1 Mylne & Keene, 4.]

as to the accuracy of the report in Ocklestone *v.* Benson, and adverted particularly to the irremediable mischief which might accrue in the case of waste, if it were open to a defendant to take advantage of this provision in the bankrupt acts. The next case was King *v.* Tullock, 2 Sim. 469, where the same question was raised upon a demurrer, which was allowed by the present Vice-Chancellor upon the authority of Ocklestone *v.* Benson. In Jones *v.* Yates, 3 Y. & J. 373, where a bill filed by the assignees of a bankrupt was demurred to on the same ground, Chief Baron Alexander overruled the demurrer, observing, that he had spoken to your Honour and the Vice-Chancellor on this point, and that if those learned judges continued of the opinion then entertained by them, a different rule would, for the future, prevail on this point in the Court of Chancery. In Dance *v.* Wyatt, 6 Bingh. 486, the Court of Common Pleas decided that the provisional assignee of the Insolvent Debtors' Court had a right to sue without an order from the court, as required by the act. Such is the state of the authorities on this point, and they must, undoubtedly, be admitted to be somewhat conflicting; but if Jones *v.* Yates be accurately reported, the point may be considered as settled. There is great force in the Chief Baron's observations on the irremediable mischief that would accrue in a case of waste, if a defendant could avail himself of this clause in the act.

For the Defendants. The objection is supported by five decisions in this court, against which there is the single case of Jones *v.* Yates, 3 Y. & J. 373, in the Court of Exchequer. There is a more recent case, Smith *v.* Biggs,* which the Vice-Chancellor decided in conformity with Ocklestone *v.* Benson, observing that he had no recollection of the conversation with the Chief Baron mentioned in the report of Jones *v.* Yates.

The Master of the Rolls said he had a strong recollection of having been spoken to by Chief Baron Alexander on this point. His opinion was very much in favour of the plaintiff. By the clause in question the legislature plainly intended to benefit the creditor; not to give an advantage to the debtor. If the suit were successful, the creditors would take the benefit; if it were unsuccessful through the fault of the assignees, they would have their remedy against the assignee. As it was desirable, however, that the rule should be uniform, he would not decide the point without conferring with some of the judges of the common law courts.

December 14.—On this day his Honour delivered judgment to the following effect:

I have had the opportunity of conversing with some of the judges at common law upon the point, and their impression is according to the inclination of opinion which I expressed at the hearing, that the provision made in the statute is to be considered as made for the benefit of the creditors alone, and that it is not competent to the defendants to take advantage of the objection that the suit has been instituted without the consent of the creditors. Upon the whole, I do not now hesitate to decide that this suit can be well sustained by the assignee, and that he is entitled to the decree sought by this bill.

If there be collusion between the plaintiffs and defendant in a suit instituted by the assignees without the previous consent of the creditors, the judgment of the court will bind the interest of the creditors; but

* July 6, 1832, before the Vice-Chancellor.

the assignees, in such case, take upon themselves the responsibility that the suit has been properly instituted and properly conducted.

Pattison *v.* Pattison.

1 *Mylne & Keene*, 12.

A testator gave to M. F., whom he afterwards married, among other bequests, 50*l.* long annuities, which he had purchased with 1000*l.* left him by the will of J. T. After his marriage he made a codicil by which he confirmed to his wife the benefits given to her by his will, in addition to the provisions made for her by her marriage settlement. He afterwards sold his long annuities, and with the produce purchased new annuities, which differed only from the long annuities by being terminable a quarter of a year sooner. Subsequently to this transaction, he made another codicil, by which he confirmed his will and former codicil: Held, that the legacy of 50*l.* long annuities was adeemed.

November 21, 1832.

JAMES PATTISON, by his will dated in April, 1829, gave to Margaret Forbes, among other bequests, the sum of 50*l.* long annuities, which he described as purchased with 1000*l.*, left him by the will of James Tillard, Esq.

The testator subsequently intermarried with Margaret Forbes; and by a codicil to his will, he confirmed to her, in addition to what she was entitled to under the settlement made upon her marriage, all and every sum and sums of money, property, estate and effects given and bequeathed to her, under the name of Margaret Forbes, by his will.

At the time of making his will, the testator had, besides the 50*l.* long annuities specifically bequeathed, other annuities of the same description; and he afterwards exchanged all his long annuities for new annuities; by which exchange he made a profit by way of *bonus*, amounting to 100*l.* The term for which the new annuities were granted, was shorter than the term of the long annuities by a quarter of a year.

Subsequently to this transaction, the testator made another codicil, by which he confirmed his will and former codicil. The question in the cause was, whether the widow was entitled to the 50*l.* new annuities purchased with the produce of the 50*l.* long annuities given to her by the will.

Mr. Bickersteth and Mr. Lloyd, for the widow:

It is clear that the exchange made by this testator of one description of stock for another was made with no view of altering the bequest. The subject of the ademption of specific legacies was much considered in Barker *v.* Rayner, 5 Mad. 208; and the clear intention of the testator in the present case will be supported by the principle upon which that case was decided: for your Honour held that a legacy, though altered in character, would not be adeemed if there was such a setting apart of the legacy, so altered in character, as would prevent ademption according to the principles of the civil law. Now in this case there is such a setting apart of the substituted legacy by the codicil of the testator. In Selwood

[Pattison *v.* Pattison.—1 Mylne & Keene, 12.]

v. Mildmay, 3 Ves. 306, a testator bequeathed part of his four per cent annuities, having no such stock at the date of his will, but having previously sold out all his four per cent annuities, and invested the produce in long annuities. There the court effectuated the intention of the testator by correcting the inaccuracy of the description: and is not the intention of the testator in this case equally manifest? A codicil, confirming the dispositions of a will, operates as a republication of the will, and is to be construed as if the testator had written his will over again at the date of the codicil. Perkins *v.* Micklethwaite, 1 P. W. 275. The testator, therefore, must be taken to have given the 50*l.* long annuities at the date of the codicil, and the court will effectuate his plain intention by substituting for this description what he certainly intended to give, an equal amount in value of the new annuities.

Mr. Pemberton and Mr. Wigram, *contrà:*

Since the decision in Barker *v.* Rayner, it is perfectly settled that a specific legacy, if it do not exist at the death of the testator, is adeemed; and this rule must prevail, without reference to the intention of the testator or to the hardship of the case; for there can be no doubt, in the present case, that the testator has failed to give effect to his own intention, and that the constructive ademption of this legacy is a hardship upon the plaintiff. In Barker *v.* Rayner, the intention of the testator not to adeem was more unequivocal than it is in the present case. There the testator bequeathed two policies of insurance, effected on the life of his wife, and *all his interest* in those policies; but as he survived his wife, and was consequently obliged to receive the money from the insurance office, your Honour held that the gift was gone, and that no interest whatever passed under this bequest. Here, in like manner, the thing given is gone, and it is impossible to speculate on probabilities, or to substitute for what the testator did give and subsequently disposed of, something different from that gift, as well *in specie*, as in respect of the difference of value between the two descriptions of annuities, which were terminable at different periods. As to the argument founded on the supposed effect of the codicil, it is true that a codicil operates as a republication of a will for certain purposes, but it cannot have the effect of setting up a specific legacy, which would otherwise fail. A codicil confirming a will can never have the effect of altering the construction of such will. That it can have no such operation was strikingly shown in the case of a testator, who, having six children at the time of making his will, directed his property to be equally divided among his six children. One of the children died; the testator afterwards had another child, and made a codicil, confirming his will; but it was held that the codicil could not be construed as applying to a different class of legatees, namely, the six children who were living at the testator's death, though there could be little doubt that such was the testator's intention. If ever there was a case in which the court would have struggled to construe a codicil as a republication of the will, so that the will might be taken to speak from the date of the codicil, that was the case; but the law upon this point is too firmly settled to admit of relaxation, whatever, under peculiar circumstances, may be the inclination of the court to relax it.

Mr. Bickersteth replied.

The Master of the Rolls:—The law is settled that a legacy is

adeemed if the specific thing do not exist at the testator's death. The testator truly described the specific gift when he made his will, and there can be no relief upon the ground of mistaken description.

Clutterbuck *v.* Clutterbuck.

1 *Mylne & Keene*, 15.

A testator directed the sum of 2000*l.* to be raised out of a certain freehold estate, and paid in satisfaction of certain specified debts, and all such other debts as he should owe at his decease; and he gave the rest, residue and remainder of his estate and effects, real and personal, to his wife, her heirs, &c.: Held, that the 2000*l.* was the primary fund for the payment of the debts.

November 26. December 14, 1832.

THE testator Thomas Clutterbuck, after giving several specific and pecuniary legacies, continued his will as follows:—"I give to my cousins Charlotte and Henrietta Brown, and to the survivor of them, one annuity or yearly sum of five guineas, to be paid by my trustees hereinafter named, out of the rents and profits of the farm lands and tenements hereinafter devised to them. I give and devise unto and to the use of my nephew Edward Clutterbuck, his heirs and assigns, all that my tenement called Aldert, situate in the parish of Fareham, in the county of Southampton, which I hold under the Lord Bishop of Winchester, for the lives of myself, my sister Mary Bennett, and my said nephew Edward Clutterbuck. I give and devise all that my estate, tenement and farm, and lands and hereditaments situate in the parish of Fareham aforesaid, and called or known by the name of Fareham farm, which I hold by lease under the said Lord Bishop of Winchester for lives of myself, my said sister Mary Bennett, and my nephew Thomas Clutterbuck, and all other my estate, lands and hereditaments whatsoever, situate in the said county of Southampton, unto and to the use of my brother Dr. Henry Clutterbuck, John Deeble Brown, and Richard Pearce, and their heirs, upon trust, out of the rents and profits of the premises so devised to them, to pay and discharge the rent and other outgoings, as and when the same shall become due and payable; and upon further trust that they the said trustees, and the survivors and survivor of them, and the heirs of such survivor, shall and do, by mortgage of the said tenement called Fareham farm, or a competent part thereof, or by such other ways and means as they shall think fit, levy and raise such sum and sums of money as shall be sufficient to pay the fine, and the cost and charges of and attending the renewal of the present and every future lease and leases of the said tenement called Fareham farm; and upon further trust that my said trustees, and the survivors, &c., shall and do, when and as soon as such new and other lease shall have been obtained as aforesaid, or as soon after as conveniently may be, by mortgage, sale, or devise of the premises or a competent part thereof, levy and raise the sum of 2000*l.*; and thereout, in the first place, pay and satisfy the debts due and owing from me to my

[Clutterbuck *v.* Clutterbuck.—1 Mylne & Keene, 15.]

brother Charles Caspar Clutterbuck, and my said brother Henry Clutterbuck respectively, or so much as shall be then unpaid, and also a debt due from me to Miss Frances Penneck of 400*l.*, with such interest as may be then due thereon, and also all such other debts as may be due and owing from me at the time of my decease; and upon further trust that my said trustees, and the survivors, &c., do and shall, from time to time, receive the rents, issues, and profits of the said tenements and lands called Fareham farm, as and when the same shall become due and payable, and pay thereout to Henry Penneck, in trust for Sarah the wife of Richard Pearse, his daughter, an annuity or clear yearly rent of 20*l.* for her life to her separate use; and upon further trust out of the same premises, to pay to my brother Charles Caspar Clutterbuck, for and during his natural life, an annuity or clear yearly sum of 200*l.* by equal half-yearly payments; and upon further trust out of the said rents and profits, after the death of my said brother Charles Caspar Clutterbuck, to pay to Harriet his now wife, for and during her natural life, an annuity or clear yearly sum of 20*l.*, and to my nieces Mary Bennett Clutterbuck and Elizabeth Clutterbuck, an annuity or yearly sum of 80*l.* during their lives and the life of the survivor of them; and subject to the several trusts aforesaid, I direct that my said trustees and the survivors and survivor of them, and his heirs, shall stand seised of the said hereditaments and premises, in trust to pay the rents, issues, and profits thereof, to and for the only use and benefit of my dear wife Jane Clutterbuck, for and during her natural life; and from and after her decease, to the only proper use and benefit of my nephews, Thomas Clutterbuck, James Clutterbuck, and Charles Clutterbuck (sons of my said brother Charles Caspar Clutterbuck), and the said Edward Clutterbuck, during their lives and the life of the survivor of them, if more than one, then share and share alike: and from and after the decease of all but one of my said nephews, then in trust to convey the said lands, hereditaments, and premises to such one surviving nephew, his heirs and assigns. I give and bequeath to my said dear wife all such interest as may be due at the time of my decease from Dr. James Woodforde on his bond to me for 500*l.*, and also the interest which may become due thereon during the life of my said wife; and I do hereby direct, that upon her decease and the payment of any interest then due to her executors, the said bond be delivered up to the said Dr. Woodforde, his executors and administrators; and as to all the rest, residue, and remainder of my estate and effects, real and personal, and wheresoever situate, I give, devise, and bequeath the same and every part thereof, unto and to the use of my said dear wife, her heirs, executors, and administrators respectively, according to the nature and quality of the same."

He afterwards made a codicil, dated the 15th of August, 1829; whereby, after stating that he had omitted to name and appoint an executor of his said will, he nominated and appointed his said wife, Jane Clutterbuck, the sole executor thereof.

In the month of November following, he made a second codicil, for the purpose of altering the amount of the new annuities which he had charged upon the Fareham farm, and for no other purpose.

The question in the cause was, whether the 2000*l.* directed to be raised out of the Fareham farm, was the primary fund for the payment of the testator's debts, or auxiliary only to the personal estate.

Mr. Jacob, for the widow, contended, that there was nothing in the

will that indicated an intention on the part of the testator to exonerate the natural fund for the payment of his debts. In Rhodes *v.* Rudge, 1 Sim. 84, it was said to have long been the settled rule of courts of equity that a direction to sell or mortgage real estate for the payment of a testator's debts and legacies is not alone evidence of the testator's intention that the personal estate should be exempt from those charges, but amounts only to a declaration that the real estate shall be so applied to the extent to which the personal estate, which by law is the primary fund, shall be insufficient for those purposes.

Mr. Bickersteth, on the other side, contended, that the gift of 2000*l.* was set apart from the residuary gift, and plainly intended by the testator to be the primary fund for the payment of his debts. If such an intention was clearly to be collected from the context of a will, it was not necessary that there should be express words to exonerate the personal estate, Greene *v.* Greene, 4 Mad. 148; Mitchell *v.* Mitchell, 5 Mad. 69.

Mr. Jacob, in reply, observed, that the present case was distinguishable from Greene *v.* Greene and Mitchell *v.* Mitchell, inasmuch as in the former of those cases the testator's funeral expenses, and in the latter the testator's funeral and testamentary expenses were expressly charged upon the real estate.

The Master of the Rolls:—I am of opinion, that the 2000*l.* is provided by the testator as the primary fund for the payment of his debts. It is not a contingent, but an immediate charge upon the devised estate for the payment of the specific debts, and all other the debts which might be due and owing from him at his death; and the residuary gift to the wife cannot be considered as a gift of the residue of the personal estate after payment of his debts, but is a general gift of all his real and personal estate not before disposed of by his will.

Hughes *v.* Wynne.

1 *Mylne & Keene*, 20.

A person conveyed estates to trustees upon trust to sell and apply the produce of sale in discharging all his bond debts, *together with the interest then due and to grow due for the same, to the day of payment.* A bond creditor claiming under this deed is not entitled to principal and interest beyond the amount of the penalty of the bond.

November 28, 1832.

BY indentures of lease and release, dated the 4th and 5th of October, 1805, Robert Watkin Wynne conveyed to trustees and their heirs the hereditaments therein described, upon trust to sell and dispose of the same, and to apply the proceeds arising from such sale in discharging all sums of money due and secured by the several bonds of the said Robert Watkin Wynne and Robert Wynne, his late father, deceased, to the several persons therein respectively named, *together with interest thereof, then due and to become due thereon* respectively; and from and after

[Hughes *v.* Wynne.—1 Mylne & Keene, 20.]

full satisfaction of all the money so due and secured as aforesaid, and *all interest then due and to grow due for the same respectively to the day of payment*, upon trust to pay the several simple contract debts of the said Robert Watkin Wynne.

By his will, dated the 15th of October, 1805, Robert Watkin Wynne directed that his debts, and funeral and testamentary expenses, should be paid out of his personal estate as far as the same would extend, and, in case of a deficiency, out of the fund thereinafter appointed for that purpose; and after giving several pecuniary legacies, charged primarily upon the surplus moneys to arise from the sale of the estate conveyed by the release of the 5th of October, 1805, the testator devised certain other estates, for the term of 500 years, as an auxiliary fund for raising such a sum of money as might be wanted in aid of his personal estate, and of the estate directed to be sold, and he authorized his trustees to raise by mortgage such sum of money as might be wanted for the purpose last mentioned.

The testator died in March, 1806. In 1814, the suit of Hughes *v.* Wynne was instituted by the trustees for the purpose of establishing the will, and carrying the trusts thereof into execution, under the direction of the court. Under a decree in that suit, David Lloyd, the representative of Thomas Lloyd, a creditor to the amount of 2675*l.*, secured in various sums by eight several bonds, proved the same bonds before the Master in the year 1819.

In another suit, (Griffith *v.* Wynne), instituted in 1821 for the purpose of carrying into effect the trusts of the indenture of the 5th of October, 1805, upon a reference directed to the same Master, to whom the cause of Hughes *v.* Wynne stood referred, the Master found by his report, dated the 5th of July, 1822, that the bond debts proved in the last mentioned cause were debts provided for by the indenture of the 5th of October, 1805, that such bond debts amounted in the whole, for principal money, to the sum of 13,843*l.* 17*s.* 1*d.*, and that the interest for the same, computed from the times from which such interest was payable up to the date of his report, amounted to 8182*l.* 18*s.* 6*d.* By another report made in the same cause, dated the 10th of February, 1825, the same Master certified that the sum due to David Lloyd for principal and interest, in respect of the eight bonds, amounted to 5163*l.* 11*s.* 6*d.*, and that the sum apportioned to him out of the fund arising from the sale of the premises comprised in the trust deed amounted to 3530*l.* 2*s.* 10*d.*, leaving a balance due to him of 1633*l.* 8*s.* 8*d.*

David Lloyd received the sum apportioned to him in the suit of Griffith *v.* Wynne, and died in 1828, having by his will appointed Hugh Owen his executor, who proved his will, and also obtained administration of the unadministered goods of Thomas Lloyd. By an order made in August, 1832, in the cause of Hughes *v.* Wynne, the residue of the debts of Robert Watkin Wynne was directed to be paid; and by a report made in pursuance of that order, the sum found due for principal and interest, in respect of the eight bonds of Thomas Lloyd, amounted to 1747*l.* 12*s.* A petition was now presented by Hugh Owen, stating the above circumstances, and also that the amount of the principal and interest due upon seven of the eight bonds greatly exceeded the penalties; and that in respect of these seven bonds, the Master, in his report of the 5th of July, 1822, had calculated and allowed principal and interest to the extent only of the penalties; whereas the full amount of the principal and interest

was, as the petitioner submitted, provided for by the trust deed down to the time of payment, without reference to the amount of the penalties of the bonds. And the petition prayed that it might be referred to the Master to take an account of what was due to the petitioner for principal and interest on the said bonds, and that the said Master might be directed to calculate the interest down to the period of payment.

Mr. Pemberton and Mr. Spence, for the petitioner.

Mr. Girdlestone, Mr. Jacob, Mr. Goodeve, and Mr. J. Russell, *contrà*.

In support of the claim of the petitioner it was insisted, that although he could not at law recover principal and interest beyond the amount of the penalty, he was entitled under the special trust created by the deed of 1805 to interest up to the time of payment. The trust deed was in the nature of an additional security, like a mortgage given after a bond, in which case it was decided that the creditor was entitled to interest without reference to the penalty of the bond; Clarke *v.* Lord Abingdon, 17 Ves. 106. Supposing the bond to be the only security, a Court of Equity would not limit the principal and interest to the amount of the penalty, if the obligee were prevented from recovering at law by the conduct of the obligor, Grant *v.* Grant, 3 Sim. 340; and what act of the obligor could more effectually restrain the creditors than the execution of the trust deed of 1805? The language of the deed was free from all ambiguity; and nothing could more strongly show the intention of Mr. Wynne to secure the payment of interest on his bond debts, without reference to the penalties, than the fact that, at the date of the execution of this deed, the interest upon one of these debts had exceeded the amount of the principal for a period of more than four years.

On the other side it was contended, that neither at law nor in equity could interest be claimed in addition to the principal, beyond the amount of the penalty of a bond, Kettleby *v.* Kettleby, 2 Dick. 514; that upon the true construction of the trust deed, the grantor could not be intended to have created a trust for the payment of more than he was legally, and even equitably, bound to pay; and that, even if that deed admitted of a different construction, the petitioner was precluded from making such a claim as the present by his acquiescence in the Master's report, which allowed him no more interest, in addition to the principal, than the amount of the penalty; and by his acceptance of an appointment upon a debt made in conformity with that report. Bond creditors could only claim interest beyond the penalty of their bonds under special circumstances, Clarke *v.* Seton, 6 Ves. 411; and in Clarke *v.* Lord Abingdon, 17 Ves. 106, there was an express contract with the creditor that he should have the benefit of a mortgage. That case, therefore, had no application to the present.

The Master of the Rolls:—The Master's report having proceeded upon the principle that the petitioner was entitled to no interest beyond the amount of the penalty of the bonds, and no exception having been taken, the petitioner was concluded by that report. The petitioner is, moreover, concluded by having accepted the apportionment in common with the other creditors; after such an acceptance it is much too late for him to call upon the court to undo all that has been done.

I do not, however, content myself with declaring my opinion on the matter of form, as this case involves very important considerations in

point of principle. Admitting this creditor to have a right to all the benefit of the trust deed, as a deed the trusts of which this court had taken upon itself to administer, I am of opinion that this deed gives him no title to interest beyond the penalty of the bond. It is expressly a trust for the payment of the several sums secured by the bonds, and of the interest due and to grow due thereon; and the interest to grow due upon a bond cannot, together with the principal, exceed the amount of the penalty. In Clarke *v.* Lord Abingdon, Sir William Grant's judgment proceeds upon the distinction between a mortgage to secure the payment of a bond and the interest due thereon, and a mortgage for securing the payment of a sum of money and the interest due thereon. Upon principle, therefore, as well as upon the point of form, I am of opinion that this petition must be dismissed with costs.

In re Goddard.

1 *Mylne & Keene*, 25.

A MORTGAGEE in fee died intestate as to his real estate, and his heir was not known. The court has no authority under the 1 W. 4 c. 60, s. 8, to appoint a person to re-convey the estate to the party entitled to the equity of redemption on his payment of the mortgage money to the executor of the mortgagee.

November 28, 1832.

Hinckley *v.* Maclarens.

1 *Mylne & Keene*, 27.

Where the words "next of kin," are used *simpliciter* in a gift over, and without any explanatory context showing a different intention on the part of the testator, they must be taken to mean next of kin according to the statute of distributions.

December 5. 14, 1832.

A TESTATOR made his will in the following words:—"I, John Sawyer Hinckley, give and bequeath to my daughter Jane all my property, real and personal; except I give to my niece Eliza Bunston 400*l.* consols." He afterwards made a codicil to his will, whereby, after stating that the said Eliza Bunston was the daughter of his wife's brother and then residing in his house, he declared his will to be, that in case of the decease of his daughter before attaining the age of twenty-one years, his property should be equally divided among his next of kin, excepting the 400*l.* consols left to Eliza Bunston.

The testator left surviving him the daughter mentioned in the will and

codicil, one brother, and two nephews and a niece, the children of two deceased sisters. The daughter died under the age of twenty-one, intestate and unmarried. The bill was filed by the brother, who claimed the whole gift, as being in the nearest degree of blood to the testator.

Mr. Bickersteth and Mr. Richards, for the plaintiff:

The question is, whether, by the words "next of kin," the testator meant nearest in consanguinity after his daughter, with respect to whom there is no question, or the next of kin according to the statute of distributions. The first case in which a similar question arose is Phillips *v.* Garth, 3 Bro. C. C. 64, where the testator left his property to be equally divided among his next of kin, share and share alike; and Mr. Justice Buller decided that the gift should be divided among the surviving brothers, nephews and nieces of the testator, *per capita*. This case came afterwards before Lord Thurlow; who expressed considerable doubt as to the propriety of Mr. Justice Buller's decision; but the case was compromised, and the point was consequently not determined. In Garrick *v.* Lord Camden, 14 Ves. 385, Lord Eldon observes that he always had great doubt of the case before Mr. Justice Buller; and in Smith *v.* Campbell, 19 Ves. 403, Sir Wm. Grant disapproves of that decision, observing that where there is nothing in a will to show that the testator used the words "next of kin" with reference to the statute of distributions, the inclination of his opinion would be that the nearest in kindred only were entitled, and that brothers and sisters would exclude nephews and nieces from participating in such a bequest. Brandon *v.* Brandon, 3 Swanst. 312, where the words were "nearest and next of kin," was decided in conformity with the opinion expressed by Sir Wm. Grant; and Sir Thomas Plumer there declares that the weight of authority is against the decision in Phillips *v.* Garth. In the present case, there is nothing in the will to lead to the inference that the testator had the statute of distributions in his contemplation; and as the opinion of four judges is opposed to the single authority which can be produced on the other side, the plaintiff, being the nearest in consanguinity to the testator, will be entitled to the whole gift.

Mr. Tinney, for the son of a deceased sister:

The present case is distinguishable from all that have been cited in this material respect, that the words upon which the question arises are in this case exactly the same as in Phillips *v.* Garth. At the date of the codicil, which was made the day before the testator's death, his family consisted of a daughter, a brother, two nephews, and a niece. Now, it is admitted that he did not mean to designate his daughter by the words "next of kin;" and as he had but one brother, is it not clear that he would have named him had he been the sole object of his bounty, instead of using, by circuity, a phrase which, it is contended, he meant to be applied to his brother? In Lowe *v.* Lord Huntingtower, 4 Russ. 532, n., it was held that collateral circumstances, relating to a testator's family, were admissible evidence, for the purpose of ascertaining the true construction of a will. In the present case, the testator, having but one brother, could not possibly have had that brother alone in his contemplation when he directed an equal division of his property among his next of kin.

[Hinckley *v.* Maclarens.—1 Mylne & Keene, 27.]

Mr. Bethell, for the other nephew, cited Edge *v.* Salisbury, Ambl. 70, and Worthington *v.* Stathen, 1 Mad. 36.*

Mr. J. Russell, for the niece:

The brother and the representatives of the deceased sisters are entitled to take, *per stirpes*, according to the sixth and seventh sections of the statute of distribution, 1 Ja. 2. c. 17. The ground of the objection taken by Lord Eldon and the other judges to the decision in Phillips *v.* Garth, was not that Mr. Justice Buller had decided that case erroneously in respect of the persons entitled to take under the description of "next of kin," but in respect of the mode of distribution. In Stamp *v.* Cooke, 1 Cox, 234, a case not referred to in Phillips *v.* Garth, because not reported at that time, it is distinctly laid down that where a bequest is given to the next of kin, without more, the statute is certainly the rule to go by; and although nephews and nieces are not so near as sisters, yet the fund is distributable, *per stirpes*, according to the statute. So in Lowndes *v.* Stone, 4 Ves. 649, distribution was decreed according to the statute.

Mr. Bickersteth, in reply:

In Lowndes *v.* Stone, the residue was left by the testator to his next of kin or heir at law; and it being perfectly uncertain whom the testator meant, Lord Eldon observed that one side had a fair retort upon the other, one contending that by "next of kin" the testator meant "heir at law," and the other insisting that by "heir at law" the testator meant "next of kin." Under these circumstances, distribution was directed according to the statute. It is true, that where the words "next of kin" are used for the purpose of indicating the persons among whom property is to be distributed, as in case of intestacy, they must be taken to mean "next of kin" according to the statute; but when they are used as words of limitation, designating the description of persons who are to take as legatees, in that case, the persons answering the description are those who are nearest in consanguinity, and not those who would take in a case of intestacy under the statute.

The Master of the Rolls said the inclination of his present opinion was extremely strong that where the words "next of kin" were used *simpliciter* in a gift over, and without explanatory context showing a different intention on the part of the testator, they must be taken to mean next of kin according to the statute of distributions. The decision in Phillips *v.* Garth had not been impeached, except as to the distribution of the property, which Mr. Justice Buller divided *per capita*, and not *per stirpes;* thereby supporting the statute for one purpose, and rejecting it for another. This was directly the effect of Lord Eldon's objection to that decision; it might also be the effect of Sir William Grant's objection to it, in Smith *v.* Campbell; and if not the effect of Sir Thomas Plumer's objection to it, in Brandon *v.* Brandon, the words of the settlement in that case were such as to render the decision not inconsistent with Phillips *v.* Garth. In fact, the appeal against Mr. Justice Buller's decision was abandoned upon a compromise amongst the next of kin, by which the property was divided between them *per stirpes*, and not *per capita;* which shows the ground of the objection taken to the decision,

* Reported as an anonymous case.

and the opinion entertained of that part of it which directs the mode of distribution.

His Honour's present opinion, therefore, was, that the property must be divided, not *per capita*, but *per stirpes*, between the brother and the representatives of the two sisters; and, unless he should intimate any alteration of that opinion, the case must be considered as so decided.

December 14.—This day his Honour intimated that his opinion was unaltered, and the decree was made accordingly.

Badham *v.* Mee.

1 *Mylne & Keene*, 32.

R. M. made a settlement of real estate to the use of himself for life, with a power to appoint to any one or more of his sons in fee or otherwise, and in default of appointment, to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and subsequently to his bankruptcy appointed to his eldest son in fee: Held, that the appointment could not enure as an appointment to a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power.

Quære, Whether the power was destroyed by the bankruptcy, the court considering that the invalidity of the appointment rendered it unnecessary to determine that point.

November 12, 13; December 14, 1832.

AT the hearing of the original cause on the 23d of June, 1830, the Master of the Rolls directed a case to be stated for the opinion of the judges of the Court of Common Pleas; and the case was accordingly stated as follows:—

"At the date and execution of the indentures next hereinafter stated, Patience Mee, widow, deceased, and Richard Mee the elder, or one of them, were or was seised in fee simple of the lands and hereditaments comprised in the said indentures.

"By indentures of lease and release, bearing date respectively the 24th and 25th of April, 1794, the release being made between, and duly executed by, Patience Mee of the first part, the said Richard Mee the elder, therein described as Richard Mee, of the second part, the Rev. John Durant of the third part, Margaret Durant of the fourth part, the Rev. John Dudley and Abrather Hawkes of the fifth part, and Sparry Peshall and George Durant of the sixth part; being the settlement made previous to the marriage of the said Richard Mee the elder with Margaret Durant, which was afterwards solemnized, the said Patience Mee and Richard Mee respectively granted, bargained, sold, and released certain lands, tenements, and hereditaments therein particularly described, unto John Dudley and Abrather Hawkes, in their actual possession then being, to hold the same to them, their heirs and assigns, to the uses thereinafter expressed, that is to say, to the use of the said Patience Mee and Richard Mee, their heirs and assigns respectively, according to their several estates and interests in the premises immediately before the execution of the

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said deed, until the intended marriage between the said Richard Mee and Margaret Durant should be solemnized; and after the solemnization thereof, to the use of the said Sparry Peshall and George Durant, their executors, administrators, and assigns, for the term of ninety-nine years, upon certain trusts, and subject thereto, to the use of the said Richard Mee and his assigns for life, without impeachment of waste; and from and after the determination of that estate, by forfeiture or otherwise, to the use of John Dudley and Abrather Hawkes, and their heirs during the natural life of the said Richard Mee, in trust to preserve the contingent remainders thereinafter limited; but, nevertheless, to permit the said Richard Mee and his assigns, during his natural life, to take the rents, issues, and profits of the said premises to his and their own use; and from and after the decease of the said Richard Mee, to the end, intent, and purpose that the said Margaret Durant and her assigns, in case she should survive the said Richard Mee, should receive and take, during the term of her natural life, out of the rents, issues, and profits of the said hereditaments, one annuity or yearly rent-charge of 150*l.*, payable as therein mentioned, which said annuity was to be in lieu of all dower and thirds; and subject to the said annuity, to the use of the said Sparry Peshall and George Durant, their executors, administrators, and assigns, for and during the term of six hundred years, to commence from the day of the death of the said Richard Mee, without impeachment of waste, upon certain trusts; and subject thereto, to the use of such one or more of the son or sons of the said Richard Mee on the body of the said Margaret Durant lawfully to be begotten, and in such shares and proportions, and for such estate and estates, in fee simple or otherwise, and under and subject to such charges, provisions, conditions, and agreements in favour of other the child or children of the said intended marriage, as the said Richard Mee in and by any deed or writing, deeds or writings, with or without power of revocation, by him to be duly executed in the presence of, and attested by three or more credible witnesses, or by his last will and testament in writing, by him to be duly executed in the presence of, and attested by three or more credible witnesses, should grant, convey, give, devise, limit, direct, or appoint the said premises, or any part thereof. And for or in default of any such grant, conveyance, gift, devise, limitation, or appointment, and subject thereto, and as to any part or parts of the said premises as should not be disposed of, or when and as the estates thereby limited should respectively fall in, cease, and determine, and subject thereto, to the use of the first son of the body of the said Richard Mee on the body of the said Margaret Durant lawfully to be begotten, in tail general; remainder to the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said Richard Mee on the body of the said Margaret Durant lawfully to be begotten, in tail general; remainder to the use of the right heirs of the said Richard Mee for ever. And it was by the said indenture declared, that it should be lawful for the said Richard Mee, at any time or times after the solemnization of the said intended marriage, whilst he should continue solvent, and not become bankrupt, by and with the privity and consent of the said Sparry Peshall and George Durant, or the survivor of them, his executors, or administrators, to be testified by any deed or writing, deeds or writings, under their or his hands and seals, or hand and seal, by demise or mortgage of the said hereditaments, or a competent part thereof, for any term not exceeding five hundred years, without

impeachment of waste, to commence and take place of all other the terms and estates thereby limited and created, to borrow and take up at interest any sum or sums of money, not exceeding in the whole the sum of 1000*l.*, to and for the proper use and benefit of the said Richard Mee, so that the said Richard Mee did enter into a covenant with the mortgagee or mortgagees for payment of the interest of the sum of 1000*l.* during his life. Provided, nevertheless, that in case the said Richard Mee should become bankrupt or insolvent, then the said sum of 1000*l.*, or any part thereof, should not be afterwards raised, and the trusts of the said term of ninety-nine years were declared to be for securing the said Margaret Durant an annuity of 150*l.* a year during the joint lives of her and the said Richard Mee, which annuity it was to be lawful for the said Richard Mee to take so long as he should continue solvent, and not become bankrupt. And it was declared that the term of six hundred years was limited upon trust, that in case there should be one or more child or children by the said Richard Mee begotten on the body of the said Margaret Durant, besides an eldest or only child, and no appointment or disposition should be made by the said Richard Mee of the messuage and hereditaments thereinafter mentioned in favour of one or more of the sons of the said intended marriage, under the aforesaid power, then and in such case the said Sparry Peshall and George Durant, and the survivor of them, his heirs, executors, administrators, and assigns, should, after the death of the said Richard Mee, and not before, unless by his express consent in writing, testified under his hand and seal, by, with, and out of the rents, issues, and profits of the said messuages, lands, and hereditaments, comprised in the said term, or by way of mortgage, sale, or other disposition of the same, or any part thereof, for all or any part of the said term, or by all or any of the ways and means aforesaid, or any other ways and means, levy and raise such portion and portions, maintenance and maintenances for such child or children, except an eldest or only son, payable at such times and in such manner as is thereinbefore expressed; that is to say, if there should be but one such child besides an eldest or only son, a sum not exceeding 1000*l.* for such younger child's portion, to be paid at such time and times and in such manner as the said Richard Mee, by any deed or writing under his hand and seal, and attested by two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, should limit, declare, direct, or appoint, and in default of such appointment, then the full sum of 1000*l.* for such younger child's portion, and in case there should be two or more children besides an eldest or only son, then the sum of 2000*l.* for their portions, the same to be divided between such two or more children, in such shares and proportions, and to be paid and payable at such ages, days, and times as the said Richard Mee, by any deed or writing under his hand and seal, attested by two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, should limit, declare, direct, and appoint, and in default of such limitation, declaration, direction, or appointment, then the said 2000*l.* to be equally divided among such younger children, share and share alike, the portion and portions of all and every such child or children, in default of any direction or appointment by the said Richard Mee, to be paid to them respectively, if a son or sons, when he or they should attain his or their respective age or ages of twenty-one years; if a daughter or daughters, when she or they should attain her or their respective age or ages of twenty-one years, or be married with the

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consent of such trustees, or the survivor of them, his executors or administrators, which should first happen after the decease of the said Richard Mee; but the postponing the payment of the said portions until after the decease of the said Richard Mee was not to prevent such portions from being considered as vested interests in such of the said sons as should attain his or their said ages, or in such of the said daughters as should attain their said ages, or be married in the lifetime of the said Richard Mee, with such consent as aforesaid; and after certain other provisions as to the said portions, it was by the said indenture declared, that in case the said Richard Mee should survive his said intended wife, and there should be no issue male of such intended marriage living at the decease of the said Margaret Durant, or all such issue male should die in the lifetime of the said Richard Mee without having lawful issue, and in case there should be one or more daughter or daughters of the said marriage living at the decease of the said Margaret Durant, then the said Sparry Peshall and George Durant should, and they were thereby empowered by such ways and means as therein mentioned, or otherwise, as they should think fit, to levy the sums of money thereinafter mentioned for the portions of such daughters; that is to say, if one daughter only, the sum of 3000*l.*, to be paid and payable at the time and in manner therein mentioned, with such benefit of survivorship and limitation in favour of the issue of a deceased daughter as therein mentioned; and the said indenture contained provisions that it should be lawful for the said Richard Mee and Margaret Durant, during their joint lives, and for the said Richard Mee, in case he should survive the said Margaret Durant, with the consent of the said Sparry Peshall and George Durant, and the survivor, &c., to be signified as therein mentioned, to convey all or any part of the said hereditaments situate in the counties of Stafford, Worcester, Salop, or Warwick, or either of them, by way of exchange for other hereditaments, provided that such hereditaments so to be taken in exchange should be settled to the same uses as the hereditaments thereby released; and further, that it should be lawful for the said Richard Mee and Margaret Durant, during their joint lives, and for the said Richard Mee, in case he should survive the said Margaret Durant, with such consent as aforesaid, absolutely to sell and dispose of the said hereditaments and premises, or the mines and minerals in or under the same, or any part thereof, and either in fee simple or for any term or number of years, and with all usual powers of working the said mines or minerals, to any person or persons whomsoever; and in order to such sales as aforesaid, that it should be lawful for the said Richard Mee and Margaret Durant, or for the said Richard Mee, in case he should survive the said Margaret Durant, by any deed or writing under their hands and seals, or the hand and seal of the said Richard Mee, in case he should survive as aforesaid, attested by two witnesses, and with such consent as aforesaid, to revoke all the said uses thereinbefore declared, and to limit such new or other uses as should be requisite; and it was thereby declared that the moneys arising from such sales should be received by the said Sparry Peshall and George Durant, and the survivor, &c., in trust, to be laid out, with such consent as therein mentioned, in the purchase of freehold hereditaments of an estate of inheritance in fee simple in possession, in the counties of Stafford, Salop, Warwick, or Worcester, free from incumbrances, to be thereupon settled to and for such uses, &c. as thereinbefore limited and declared concerning the said hereditaments thereby released."

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The intended marriage between the said Richard Mee and Margaret Durant was duly solemnized. Margaret Mee (formerly Durant) died, leaving issue of the marriage four children only, namely, Richard Mee, the younger, Caroline Mee, Sarah Mee, and John Mee; of whom Caroline Mee and Richard Mee the son respectively attained the age of twenty-one years before June, 1829.

On the 12th of June, 1798, a commission of bankrupt was awarded and issued against Richard Mee the elder, under which he was duly found and declared a bankrupt, and John Hodgetts and Thomas Brettell were chosen assignees of his estate and effects; and by indentures of bargain and sale, duly enrolled and bearing date the 14th of July, 1798, the major part of the commissioners in the said commission did, so far as they lawfully might, bargain and sell unto and to the use of the said John Hodgetts and Thomas Brettell, their heirs and assigns (*inter alia*), the aforesaid lands and hereditaments.

The assignees afterwards contracted with Mrs. Patience Mee to sell to her the whole of their estate and interest in the said premises, and accordingly, by indentures of lease and release, bearing date respectively the 9th and 10th of May, 1799, the release purporting to be made between John Hodgetts and Thomas Brettell of the first part, Richard Mee of the second part, and Patience Mee of the third part, it was witnessed, that in pursuance of the said agreement, and in consideration of 440*l.* paid by the said Patience Mee, they, the said John Hodgetts and Thomas Brettell, did, according to their respective estates and interests in the premises, bargain, sell, aliene, release, and confirm unto the said Patience Mee, and to her heirs and assigns, all the aforesaid lands and hereditaments, to hold the same unto the said Patience Mee, her heirs and assigns, to and for the only proper use and behoof of the said Patience Mee, her heirs and assigns forever; chargeable, nevertheless, and subject to the contingencies mentioned in the said indenture of settlement.

Mrs. Patience Mee died in 1806, having made her will, bearing date the 15th of December, 1801, and duly executed so as to pass freehold lands by devise; and by that will she disposed of the interest which she took in the said hereditaments under the aforesaid conveyance, in favour of certain persons who were defendants, or had transmitted their interests to defendants in this suit.

By a deed poll, dated the 2d of January, 1819, under the hand and seal of the said Richard Mee the elder, and attested in the manner required for the due exercise of the power reserved to him by the aforesaid marriage settlement, after referring to his said power and reciting, among other things, that there were then living, issue of the said Richard Mee by the said Margaret Mee four children only; viz., Caroline Mee, Richard Mee, Sarah Mee, and John Mee, and that the said Caroline Mee and Richard Mee had attained their respective ages of twenty-one years, the said Richard Mee the elder did, in pursuance thereof, direct, limit, and appoint, that from and after the decease of him, Richard Mee the father, and the determination of his life estate, and the determination of the said term of 600 years, and in the mean time subject and without prejudice to the estate for life of the said Richard Mee, party thereto, and to the said term of 600 years, and the trusts of the said term, as far as they were capable of taking effect, the said lands and hereditaments should remain to the use of the said Richard Mee the son, his heirs and assigns forever, nevertheless charged and chargeable with such sum and sums of money

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as should become payable under the appointment thereinafter made; the same to be in discharge and satisfaction of the portions, if any, to which the said Caroline Mee and Sarah Mee were or might be, or might claim to be entitled to receive under or by virtue of the before-mentioned indenture of the 25th of April, 1794; and the said Richard Mee, the father, in exercise and execution of the said power, did also direct, limit, and appoint the sum of 5000*l.* to be raised for and paid to the said Caroline Mee, Sarah Mee, and John Mee, their executors, administrators, and assigns, on the decease of the said Richard Mee, the father, in the manner therein mentioned. In this deed was contained also a proviso that the sum of 3000*l.*, part of the said sum of 5000*l.*, and the interest on the said sum of 3000*l.* should be raised and payable so far only as it could be answered and raised out of the mines and minerals being under the surface of the lands and hereditaments thereby appointed to the said Richard Mee the son, his heirs and assigns; and by the said deed Richard Mee the elder did further direct and appoint, that, notwithstanding all or any of the trusts or provisoes thereinbefore expressed and declared concerning the said sum of 5000*l.* and the interest thereof, it should be lawful for him, at any time during his life, by any indenture or indentures, deed or deeds, to be sealed and delivered or executed as therein mentioned, to alter, vary, revoke, annul, and determine all and every or any of the trusts and provisions thereinbefore declared concerning the sum of 5000*l.* and the interest thereof, and by the same or any other indenture or indentures, deed or deeds, to be executed and attested as aforesaid, with or without power of revocation, to declare, direct, or appoint any new or other trust or trusts, and make any new appointment concerning all or any part of the said sum of 5000*l.* and interest, in lieu or stead of the trusts, powers, and directions which should be altered, varied, revoked, cancelled, and determined as aforesaid, in like manner as the said Richard Mee might have done under or by virtue of the said original power, so as the sum to be appointed should not exceed a sum therein mentioned, and so as all such sum and sums of money and interest, except 2000*l.*, part thereof, and the interest of that sum, should be raised or raisable only from mines and mineral property, and so as the interest of the sum or sums to be so appointed should not exceed the rate of 5*l.* for 100*l.* by the year.

Some time afterwards, Richard Mee the son died, leaving the plaintiff, Sarah Patience Mee, his only child, surviving him. There being various equitable claims affecting the said lands and hereditaments, the suit was instituted, among other purposes, in order to ascertain the rights and interests of the different parties in the said premises; and at the hearing of the cause on the 28th of June, 1830, his Honour the Master of the Rolls was pleased to direct that a case should be made for the opinion of the judges of the court of Common Pleas, and that the question for the said court should be what estate, from and after the execution of the said deed of appointment of the 2d of January, 1819, Richard Mee took in the said lands and hereditaments under the said deed of appointment, and the said deeds of the 24th and 25th days of April, 1794, or any or either of them.

The case was argued in the court of Common Pleas on the 8th of June, 1831, and the argument of counsel is reported in 7 Bingham, 695. The judges afterwards sent a certificate in the following words:—"We have heard this case argued by counsel, and have considered the same; and we

are of opinion, that from and after the execution of the deed of appointment of the 2d of January, 1819, Richard Mee the son did not take any estate in the lands and hereditaments mentioned in the case under the said deed of appointment; but, under the deeds of the 24th and 25th of April, 1794, took an estate tail in remainder expectant on the determination of the life estate of his father. N. C. Tindal, J. A. Park, J. Gaselee, J. B. Bosanquet."

An application was now made to the court on behalf of those parties, who claimed under the appointment made by the bankrupt, that the certificate of the judges might not be confirmed, but that the case might be sent to some other court.

Mr. Tinney for Caroline Mee:

In this case the tenant for life has a general power to appoint to any of the children of the marriage, with remainder, in default of appointment, to his first and other sons in tail, remainder to himself in fee; the power, therefore, is partly appendant, and partly in gross. The argument to which the attention of the Court of Common Pleas was chiefly drawn, and which may be presumed, therefore, to have influenced the court in returning their certificate, was this:—that if the bankrupt had done any act by which he had deprived himself of his ultimate reversion, he could not make an appointment in fee to his son, because he could not derogate from his own grant; and the effect of such an appointment would be to destroy the reversion which, by the operation of his bankruptcy, was conveyed to his assignees. Now, this argument was founded on an erroneous view of the nature and effect of the act by which the interest of the bankrupt was conveyed to his assignees. The bargain and sale by the commissioners was an innocent conveyance; and though it is true that a tenant for life may destroy his power by a tortious conveyance, such as fine, recovery, or feoffment, even though the power be in gross, according to your Honour's decision in Smith *v.* Death, 5 Mad. 371, and West *v.* Berney, 1 Russ. & Myl. 431, it has never been pretended that such a power can be destroyed by an innocent conveyance. It is true that the exercise of the power by the bankrupt is bad, in so far as it interferes with the rights of the assignees; but, so far as it may take effect without interfering with those rights, or, which is the same thing, without interfering with the bankrupt's ultimate reversion, it is good. The estate in fee to the eldest son is good, so long as there is any issue of the first and second sons; for so long as there is any such issue, the reversion of the bankrupt can never take effect. It is a fee-simple, determinable upon failure of the issue of these two sons; and this estate, being such as the settlement enabled him to create, cannot be impeached. The effect of the loss of his own interest by the bankruptcy is the same as if he had parted with that interest by an innocent conveyance: the bankruptcy operated no extinguishment of the power; it merely prevented the bankrupt's appointment from taking effect, so as to defeat the rights which his bankruptcy created. The appointment is certainly not good as against the assignees, in case of failure of issue of the two sons; but, until such failure, neither the assignees nor any other party can be heard to say that the power is extinguished. One of the arguments relied upon in the Court of Common Pleas was, that the appointment must be considered exactly as if it were a limitation in the original settlement; and that if it were inserted in the original settlement it would be bad, inasmuch as a fee cannot be limited

[Badham *v.* Mee.—1 Mylne & Keene, 32.]

with a remainder over. The fallacy of this reasoning consists in this,—that if Richard Mee had made an appointment in fee, without any previous bankruptcy, such an appointment would have necessarily destroyed his reversion. Two inconsistent states of things are confounded in the argument. A fee mounted upon a fee in the settlement would undoubtedly be bad; but there is no objection to appointing to an estate in fee which may, under certain circumstances, become inconsistent with a remainder over, but which, until those circumstances arise, is perfectly good. It has been questioned whether a power in gross could be destroyed, even by a tortious act; an innocent act, such as a conveyance by bargain and sale, to which the act of bankruptcy is equivalent, certainly cannot destroy it. All we have to inquire is, how far the appointment may interfere with the bargain and sale, for it is undoubtedly true, that a man cannot derogate from his own grant; and to the extent to which the appointment may interfere with the bargain and sale, to that extent, and no further, will it be affected.

Mr. Preston, for the husband of the other daughter of Richard Mee the elder:

This certificate cannot be supported consistently with general principles of law, or with the authorities, so far as authorities are capable of being applied by analogy to a question which has never been expressly decided. As the donee of the power in this case has not executed any conveyance, or done any act by which he has released his power, it follows that, if his power be released, it must be by operation of law. Now, there is nothing in the bankrupt acts to support the inference that his power was extinguished or even suspended by his bankruptcy. In Thorpe *v.* Goodall, 1 Rose, 40; S. C. 17 Ves. 388, Lord Eldon declared, that he could not see his way to compel the execution of a power coupled with an interest by a bankrupt even in favour of creditors; and, in consequence of that opinion, a provision was made in the 3 G. 4. c. 31, s. 3, now continued in the seventy-seventh section of the 6 G. 4. c. 16, by which a distinction is taken between powers considered as mere authorities, and powers by the exercise of which the assets of the bankrupt may be increased, the assignees being thereby enabled to execute powers of the latter description in the same manner as the bankrupt himself might have done. In this case it is not pretended that the power is of such a description as the assignees were capable of executing; and it is perfectly open to contend, in the first place, that the bankruptcy in no degree affected the power, but left it completely at large, as if there had been no bargain and sale by the commissioners; and, secondly, if the court should not accede to that proposition, that the appointment passed a base fee to take effect on the extinction of the prior estates tail. The bankruptcy, with the bargain and sale by the commissioners, had no other effect than to take from the ultimate fee the liability of being defeated by the exercise of the power: all other things were left *in statu quo*, exactly as if, by a release, the bankrupt had released his life estate and his ultimate fee, covenanting not to exercise his power as against the reversion, but reserving to himself the right of exercising his power *quoad* the estates tail, and the charge in favour of younger children. Lamentable indeed would it be, if the bankrupt laws prevented men from exercising such powers, which, while they have no effect either to increase or diminish the assets of bankrupts, are essential to the convenience of families, and to the effectuating of such

provisions as it may be proper to make for the benefit of younger children. If the bargain and sale by the commissioners be equivalent to a conveyance of all the bankrupt's interest in the reversion, such a conveyance would leave untouched the bankrupt's power of charging the reversion in favour of younger children. But supposing the appointment to be incapable of being supported to the full extent, or in the precise form in which the bankrupt has attempted to exercise his power, substantial effect may be given to the intention of the donee of the power by considering the appointment as equivalent to an appointment to a base fee determinable on the extinction of the prior estates tail. A defect of this description in the execution of a power will be supplied by a Court of Equity. Gilmore *v.* Harris, 3 Lev. 213; Carth. 292; Skin. 324. If the certificate of the Court of Common Pleas be right, the tenant in tail may, when he attains his majority, gain the fee by suffering a common recovery. How, therefore, are the assignees placed in a better situation by this certificate? The justice of the case coincides with the provisions of the bankrupt acts, and the rules of law, which prescribe that nothing shall be taken from the bankrupt, except that which he could give for the benefit of his creditors.

Mr. Bickersteth, for a mortgagee claiming under the appointment:

It is material to consider by whom the claim against the appointment is raised. If it were raised in behalf of creditors, or of the assignees of the bankrupt, or of purchasers from the assignees, there would be no ground of complaint against any of those persons. But the claim is made on behalf of issue of the bankrupt, in virtue of their title as tenants in tail, which title it is admitted that, but for the bankruptcy, he would have had an indisputable right to defeat by his general power of appointment. The creditors may have a right to contend that the appointment is bad, inasmuch as the bankrupt is concluded by the bargain and sale, and cannot derogate from his own grant; but, in the absence of all contention on the part of the creditors, what pretence can the children of the bankrupt have for raising this objection to an appointment which, except as against the claims of creditors, the donee of the power had an undoubted right to make?

Mr. Rolfe, for a purchaser of the reversion.

Mr. Spence, Mr. Kindersley, Mr. Bethell, and Mr. Wright, for other parties.

Mr. Pemberton and Mr. J. Russell, for Sarah Mee, the widow, and Sarah Patience Mee, the daughter of Richard Mee the younger:

The first question to be considered is, whether this power was destroyed by the bankruptcy; the second, whether, supposing the power not to be destroyed by the bankruptcy, it was well executed by the donee. According to the doctrine which has been established by your Honour in the cases of Smith *v.* Death, 5 Mad. 371, and West *v.* Berney, 1 Russ. & Myl. 431, any power which is not simply a collateral power, but coupled with an interest, may be released or extinguished by the grantee. This doctrine, therefore, applies as well to powers in gross as to powers appendant. In this case the donee of the power was the owner of the reversion; and, as the charge in favour of younger children was to take effect out of his reversion, the power was, to that extent, appendant—a power of appointment to take effect out of the interest of the grantee. It

[Badham *v.* Mee.—1 Mylne & Keene, 32.]

is admitted on all hands, that such a power is capable of being destroyed; fine or recovery would, at all events, have destroyed this power, without reference to the extent to which it may be considered a power appendant, to take effect out of the reversion. The distinction, in respect of the capability of destruction, between a power simply collateral and a power in gross, where neither power is to be exercised for the benefit of the donee, is not at first sight very obvious. A power of charging for the benefit of younger children is evidently a power which gives a species of interest to the father; but the chief ground upon which such a power is distinguished from a power simply collateral is this, that it is connected in privity with the estate of the donee, and therefore a destruction of the estate destroys the power, whereas, in the case of a simply collateral power, the donee, having no estate, cannot by any act destroy the power. Whether an act of bankruptcy is or is not equivalent, in its effect upon powers, to a fine or recovery, is an entirely new question. That it has such an effect might be inferred from the language of the bankrupt act, 6 G. 4. c. 16, s. 65, which declares that the sale of the bankrupt's real estate by the commissioners shall be good against all persons whom he might have barred by fine, common recovery, or any other means. The great point contested in West *v.* Berney, 1 Russ. & Myl. 436, was, whether the principles, which were admitted to apply to general powers, could apply to cases where the power was to be exercised for the benefit of particular objects; and Mr. Preston then insisted, that a power of charging for younger children was an interest not in the appointor, but in the appointee, and consequently in the nature of a trust which was not capable of being released or extinguished. But what was your Honour's answer to that reasoning? "It is not a trust, because the alleged *cestui que trust* cannot call for the execution of it. It may be exercised or not, and a dealing with the estate inconsistent with the exercise of it determines the option to exercise it. And this reasoning would apply equally to a power simply collateral. The difference, however, is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasible." It is clear, therefore, that the power in the present case was one which the bankrupt might have released, and which he might by fine or recovery have destroyed. In Thorpe *v.* Goodall, 17 Ves. 388, Lord Eldon was of opinion, that a bankrupt could not be compelled to exercise for his creditors a power which he might have exercised for his own benefit; a provision was consequently introduced into the bankrupt laws, enabling the assignees to execute all powers vested in any bankrupt, which he might legally execute for his own benefit. This left the general question, as to the destruction of powers, wholly untouched. In this case the power could not be executed by the assignees; and the question is, whether the donee could execute it after his bankruptcy. It has been said, indeed, that he could execute it to any extent, so as to bind the whole fee simple of the property. But see how the interests of creditors might be affected, if this proposition were capable of being maintained. If the son were likely to die without issue, it would be the interest of the reversioner not to make a larger provision than necessary for younger children; but after his bankruptcy, all that he gave to younger children he would take, not from himself, but from his creditors. He might charge the reversion in favour of younger children, so as to absorb and exhaust the whole value of the property. But it is clear, that to the

extent of the reversion the power was a power appendant, to take effect out of the interest of the donee; and this interest in the reversion necessarily passed under the bargain and sale by the commissioners.

As to the second question, whether the power, supposing it not to be destroyed by the bankruptcy, has, in this case, been well executed; it is said that, though the bankrupt might have no power of affecting the reversion, he had the power of creating a base fee, and that, although the appointment cannot take effect in the mode intended by the bankrupt, it is good to the extent to which it may operate without interfering with the rights of the assignees. What the bankrupt intended to do is clear; he intended to give the absolute fee-simple to his son, and to charge that fee-simple with the sum of 5000*l.* It is admitted that the appointment to the son cannot take effect to the whole amount of the fee-simple; how then is it possible to compute the difference between the value of the fee-simple, and of the base fee, or the extent to which that difference may affect the charge. The fee-simple might well support the charge, but the value of the base fee might not be more than equal to the charge, or it might even fall short of it. With what colour can it be said that by substituting that most inconvenient estate, a base fee, for the fee-simple which was intended to be given, the intention of the appointor will be effectuated? Equity will aid the imperfect execution of a power where it is possible to distinguish that part of the execution which is good, from that which is bad; Routledge *v.* Dorril, 2 Ves. jun. 357; Boyce *v.* Hanning, 2 Crompt. & Jerv. 334: but it is impossible in this case to distinguish the boundary between the lawful and the irregular execution of the power. The conclusive answer, however, to the argument by which the appointment is attempted to be supported, as an appointment to a base fee, determinable on the extinction of the estates tail, is this, that if such a limitation were introduced into the settlement creating the power, it would be a limitation to A. and his heirs, so long as there are issue of A. and B. with remainder to C. in fee, which would be a fee limited upon a fee, and obviously bad.

Mr. Tinney in reply:

So far as this power is to be considered as a power in gross, the assignees have nothing to do with the execution of it, and to that extent the appointment is good. Edwards *v.* Slater, Hard. 410, is a strong authority to show that a power in gross is not affected by an innocent conveyance, such as a bargain and sale. In that case a man settled estates to himself for life, with divers remainders over in tail, the reversion to himself in fee, with a power to jointure, and to make a lease for thirty-one years to commence after his death, for raising portions for his daughters. He made a jointure pursuant to his power, and then bargained and sold the lands by deed enrolled, and took back a reconveyance by feoffment; whereupon he made a lease for thirty-one years, to raise portions for two of his daughters, and he and his wife afterwards levied a fine. Taking the bargain and sale of the settlor as equivalent to the bargain and sale by the commissioners, that case bears a strong resemblance to the present. And what was the effect of that bargain and sale? Chief Baron Hale held that the power to lease for thirty-one years was not destroyed by the bargain and sale; and that, although the tenant for life by that bargain and sale passed away his life estate, and his reversion, yet it did not touch the estates tail, and that, till the remainder in fee came into being,

[Badham *v.* Mee.—1 Mylne & Keene, 32.]

the power was collateral, and in gross *quoad* the remainders in tail, which were precedent to it. Long *v.* Rankin, Sugd. Powers, 676, 6th edit. which was in the House of Lords, is still a stronger authority to show that the power could not be destroyed in the present case, for there the power was appendant. A tenant for life, with a power of leasing, conveyed away his life estate, but it being stipulated that he might exercise his power with the consent of the grantee, it was held that the power might be legally exercised, notwithstanding the conveyance of the life estate. There is not only no act of parliament which sanctions the extinction of a bankrupt's power, where the power is in gross, but a power of nomination is expressly excepted in that clause which enables the assignees to execute powers which the bankrupt might have executed for his benefit. Now the power of appointing among his children was merely an authority in which the bankrupt himself had no interest. As far as the interrsts of the creditors are concerned, they would be placed in a better situation by the construction for which we contend, than they would be by holding that the power is destroyed. In the latter case the tenant in tail may gain the fee by suffering a common recovery, whereas a base fee cannot be destroyed by a recovery.

December 14.—The Master of the Rolls:—In this case, a settlement was made by a father, who afterwards became a bankrupt, of certain real estates, to the use of himself for life, with a power to appoint to any one or more of his sons in fee or otherwise, and, in default of appointment, to his first and other sons in tail, with remainder in fee to himself. The settlor, after he became a bankrupt, and after the assignment of his property, executed the power, conceiving that he was entitled to do so, notwithstanding his bankruptcy; and by that execution of the power he gave to his eldest son an estate in fee. The question was, whether that appointment, after the bankruptcy, was or was not a good execution of the power. At the hearing of the cause, I directed a case to be made for the opinion of the Court of Common Pleas, and that court has certified that the appointment is void, but that the eldest son took an estate tail by the effect of the limitation over in default of appointment. It has been contended, that the opinion of the Court of Common Pleas is wrong, and that the case ought to be sent for the opinion of another court of law. In this case, as it is unfortunately the practice in all cases, the Court of Common Pleas has not assigned the reasons on which its opinion is founded. The practice of the courts of common law not to assign the reasons of their opinions upon cases sent from courts of equity is a practice of modern introduction, and it is much to be regretted; being at once disadvantageous to the public, and inconvenient to the court directing the case, which is deprived by this practice of the assistance it would derive from the opinion of the court of law, were the grounds of such opinion disclosed. The object of directing a case is to know the opinion of a court of law upon the point in question; not, indeed, that such opinion is to be treated as a decision, but in order that the Court of Equity may be assisted in forming its judgment. It might well be expected, therefore, that the court which directs the case should have the advantage of knowing the grounds upon which the opinion of the court of law is founded.

It is conjectured in this case, from an observation made by one of the judges in the course of the argument, that the Court of Common Pleas decided against the validity of the appointment, upon the ground, that

by the execution of a power no estate can be created which would not have been valid if limited in the deed creating the power. If, therefore, it were admitted that the power of appointment continued in the bankrupt, notwithstanding his bankruptcy, and that the appointment in favour of the eldest son in fee might be construed as an appointment creating a base fee only, and not prejudicing the remainder, which passed to the assignees under the commission, the appointment would, nevertheless, be void, because a limitation to that effect would have been void in the original deed creating the power, inasmuch as the rule of law does not permit one fee to be limited after another, although the first fee be only a base or determinable fee. This rule applies to the present case, in which the donee has a particular and a general power, and will support the opinion which has been formed by the judges of the Court of Common Pleas.

As I confirm the opinion of the Court of Common Pleas on this point, it is unnecessary that I should express any opinion on the other views of the case which have been taken in the argument at the bar. I must therefore make my decree to the effect of the certificate.

Gosden *v.* Dotterill.

[1 *Mylne & Keene*, 56.]

A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease his property consisted of 600*l.* 3 per cent consols, and 119*l.* in sovereigns: Held, that the stock did not pass under the words "money;" under the words "free from all expense," the legacy of 100*l.* was to be paid discharged of duty.

November 23. December 14, 1832.

THE will of John Gosden contained the following bequest: "I give and bequeath to my sister, Mrs. Jane Dotterill, a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to my sister, Mrs. Jane Dotterill, free from all expense; and I also bequeath a legacy of 20*l.* to my nephew, John Dotterill, and the rest of my money to be equally divided, share and share alike, between my brother Joseph Gosden, and my niece Jane Penfold." The testator's property, at the time of his decease, consisted of 600*l.* 3 per cent consols, 119*l.* in sovereigns, 11*l.* arrears of pension due to him from Chelsea Hospital, and some household furniture, of trifling value; and the material question in the cause was, whether the stock would pass to the residuary legatees under the words "rest of my money."

Mr. Jacob, for the residuary legatees:

As the sum of 600*l.* stock constituted the bulk of the testator's property, there can be no doubt that he used the word "money" in its popular sense, and not as distinguished from *stock;* for without resort to the

stock, the residuary gift of the money would have been nugatory. There are several cases in which the word "money" has been held sufficient to pass stock. In Lynn *v.* Kerridge, 1 West's Rep. temp. Hardw. 172, where the testator gave all his moneys, not otherwise disposed of by his will, to his younger children, Lord Hardwicke held that East India stock passed under the word *moneys*. In Ommaney *v.* Butcher, 1 Turn. & Russ. 260, it was held that the words "money remaining" did not pass stock which formed part of the general residue, because there was an express reference to a certain portion of the testator's property directed to be sold, which restricted the meaning of these words to the residue of the produce of sale. This case, therefore, is, in effect, an authority in favour of the proposition that the word "money" will generally pass stock forming part of the residue. In Legge *v.* Asgill, which is reported in a note to Ommaney *v.* Butcher, your Honour decided that stock, in which the testator had an interest subject to be devested, passed under the words "money left unemployed;" and that decision was affirmed upon appeal. In Kendall *v.* Kendall, 4 Russ. 360, it was decided that a bequest of "all moneys, goods, chattels, clothing," &c. would pass the testator's interest in stock, and your Honour then said, that in cases of this description, the question was, whether the words "money," and the like, were so qualified by the context that an intention was manifested on the part of the testator to exclude stock. Here there is clearly no intention to exclude stock: on the contrary, the exclusion of stock would defeat the plain intention of the testator; for, in that case, there would not be money to pay the legacies which he has given, and an intestacy would be created as to the bulk of his property.

Mr. Bickersteth and Mr. Goodeve, *contrà:*

It is not pretended that the household furniture will pass as part of the residuary gift under the word "money." As to that part of the testator's property, therefore, it is admitted that there must be an intestacy, and the question is, whether the stock is not also undisposed of. In this will there is nothing from which it can be collected that the testator meant to use the word "money" in any other than its proper and ordinary sense. In Hotham *v.* Sutton, 17 Ves. 319, Lord Eldon distinctly lays down the general proposition that *stock* does not pass by the word "money;" and this opinion consists with one of as early a date as the time of Lord Chief Baron Gilbert, (Gilb. Eq. Rep. 202); for that eminent judge thought that stock could no more be comprehended under the word "money," than a term of years, or a coach and horses, or any other real or personal chattel. There must be expressions in the context of a will to show that the testator meant something more than money in order to pass stock under that word; and the cases cited on the other side are cases in which such an intention was indicated by the context. What is there in this will to show that the testator meant any thing more than money, after full effect has been given to every word of the instrument? Stock is nowhere mentioned; and the court cannot look out of the will to the state of the testator's property, for the purpose of giving to the will a construction contrary to that which the language used by the testator imports. Not only is there no indication of an intention, on the face of this will, to include stock under the word money, in the residuary clause, but the evidence of intention, as far as it goes, is directly the other way: for in the previous part of the will, he uses the words

"lawful money of Great Britain;" thereby showing expressly what he meant to pass when he disposes of the "rest of his money."

Mr. Jacob in reply:

In Hotham *v.* Sutton, there was a deliberate contrast of "stock" and money throughout the will. If any thing is to be inferred from the circumstance of the testator having used technical words in the specific bequest, and not in the residuary clause, the conclusion would be, that he meant the expression used in the latter case to be understood, not in a technical, but in its popular sense. Now, in common parlance, the word "money," undoubtedly includes stock, and frequently has especial reference to money in the funds: thus, in ordinary language, we might certainly say with sufficient propriety of a large fundholder, that he was possessed of a great deal of money. If the testator's expression be not technically accurate, it is sufficiently so in this case to place his intention beyond all doubt, and that intention the court will effectuate.

The Master of the Rolls:—I have no doubt that it was the intention of this testator that the stock should pass under the term "money;" but if it be settled that stock shall not pass under the term "money," unless there be some explanatory context in the will, I am afraid that the testator's intention will not be effectuated; for here there is no such explanatory context. I will, however, look into all the authorities before deciding this case. As to the state of the testator's property, that is never referred to in aid of the construction of a will, because the will speaks at the death of the testator; and when a testator makes his will, it is uncertain what the state of his property may be at his decease.

December 14.—The Master of the Rolls:—I was desirous of looking into the authorities before deciding the case; and I find the authorities confirm the impression I had at the hearing of the cause, that the term "money" will not pass stock, unless there is in the will some explanatory context; and here is no explanatory context.

Mr. Jacob suggested that it was questionable whether the legacy to Mrs. Dotterill was given to her free of legacy duty, under the words "free from all expense," inasmuch as the expression was capable of reference to expenditure attending the payment.

His Honour was of opinion that the legacy was to be paid discharged of the duty.

Walburn *v.* Ingilby.

1 *Mylne & Keene*, 61.

A bill against the directors of an unincorporated joint stock company by a holder of shares, of which some were original, and others derivative, alleging a fraud, whereby the defendants had profited at the expense of the company, and praying that they might account for such profits to the partnership: Held, to be demurrable, because it did not specifically state the mode in which the plaintiff became a shareholder, and the manner of his holding, or whether, as to his derivative shares, he had performed the conditions upon which, as appeared from the regulations of the company, the transfer of shares was to be permitted.

Semble, The persons by whom the shares were assigned to the plaintiff ought to have been made parties.

Where books and papers, the joint property of the defendants and of other persons not before the court, were admitted, by the answer, to be in the custody of a third party, as the common agent of all, an order was made upon such agent to permit an inspection by the plaintiff, against the consent of those owners who were not parties, on the principle that the court has a right to give the plaintiff whatever access the defendant himself would be entitled to.

An application to stay the execution of the order for production, pending an appeal to the House of Lords, against the order, was refused, with costs.

Nov. 23, 24. 26; Dec. 12, 1832. June 20; Nov. 16; Dec. 20, 1833.

THE bill stated that about the close of the year 1824, a joint stock company was formed by certain individuals in London, who afterwards became directors of the company, for the purpose of working valuable mines of gold, silver, and other metals, in the province of Potosi la Paz, and elsewhere in Peru: and it set forth a prospectus issued by the directors in April, 1825, announcing to the public the nature and objects of the association. This prospectus was headed "Potosi la Paz and Peruvian Mining Association; the capital to be 1,000,000*l.* sterling; President, Don Juan Garcia del Rio, late minister plenipotentiary from Peru to the courts of Europe; Vice President, General James Parosien, also late minister plenipotentiary from Peru to the courts of Europe:" and, after describing in strong terms the favourable circumstances under which the company was established, and the advantages which it held out to speculators for a profitable investment of capital, and specifying the names of the persons in whom, as directors, auditors, bankers, secretaries, and agents, the management of the concern was vested, it proceeded to explain the proposed constitution and regulations of the association, and the conditions upon which the public were invited to become shareholders, in the following manner:—"The capital is to be 1,000,000*l.* sterling, divided into 20,000 shares of 50*l.* each: the first instalment of 5*l.* per share is to be paid on or before the 30th of April instant, into the hands of either of the bankers of the association, to the account of the directors, and the remaining 45*l.* per share by such instalments as may be from time to time required by the directors, upon their giving twenty-one days previous notice of each call. Qualification of a director thirty shares; of an auditor twenty shares. At all meetings of shareholders

[Walburn v. Ingilby.—1 Mylne & Keene, 61.]

each proprietor of ten shares to have one vote; of twenty and upwards, two votes: after the first six months from the date of the deed of association, shares shall not be considered a qualification for voting until held for six calendar months. The directors are to appoint three trustees from among themselves, in whose names all investments are to be made. The present directors are to remain in office for the first five years; at the expiration of that time three are to go out annually, but will be re-eligible. The capital may be increased, if deemed advisable by the directors for the time being, and approved by a majority of the votes of the shareholders present at a general meeting convened for that purpose. As soon as the directors shall consider that the concerns of the association are sufficiently advanced to enable them to report thereon, a special meeting of the proprietors is to be convened. Subsequently, a general meeting is to be held annually, when the progress and state of the concerns are to be reported to them. The first dividend is to be made as soon as a profit of 5*l.* per cent has been realized; and subsequently, as circumstances may admit. No shares are to be sold or transferred, nor shall any proprietor be entitled to vote, until he shall have paid all the previous calls thereon. No transfer made by a proprietor shall be valid at law or in equity, unless the purchaser shall have been approved by or under the authority of a board of directors, and the purchaser shall have executed a proper instrument to bind him to the observance of the regulations of the association. Provision is to be contained in all engagements to be entered into by the directors in behalf of the association, that no shareholder shall be subject or liable beyond the amount of his share or shares. A deed is preparing, and, when approved by a majority in number of directors, is to be the deed for establishing the association; and it is to contain such covenants, resolutions, provisoes, powers of reference to arbitrators, regulations for managing the concerns, forfeiture of shares, and dissolution of the association, and such other powers, stipulations, conditions and clauses, as the directors, or major part in number of them, shall deem best adapted to effectuate the objects of the association. The deed is to be executed by each proprietor within twenty-one days after notice shall have been given in the London Gazette, and two daily newspapers, of its being ready for signature, on penalty of the forfeiture of the shares allotted to him, and of the instalment paid thereon. The deed is to be subsequently enrolled in the High Court of Chancery."

The bill then stated that the defendants, together with Hunter, who had since become bankrupt, and obtained his certificate, were the original directors, and still continued to be directors of the association, and that in that character they had ever since continued to possess the exclusive management of the association; that they opened a banking account with Curtis & Co., and Glynn & Co., in behalf of the association, and that all moneys paid in respect of the association were placed to their account with those banking houses, as such directors. That a great number of persons were induced by the confidence they had in the directors, who were men of great credit and respectability in London, and by the favourable accounts given in the prospectus, to make application for shares in the association, and that the number of shares so applied for and issued, amounted to 11,210. That when any person became a shareholder, he received from the directors a written paper, stating the number of shares he held, and on taking that paper to the bankers, and paying the first instalment of 5*l.* on each share, he received in exchange for it a scrip receipt in the follow-

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ing form:—"No. Potosi la Paz and Peruvian Mining Association. Received the day of 182 of the directors of the Potosi la Paz and Peruvian Mining Association, the sum of *l.* to account for on demand." That the proprietors of the aforesaid 11,210 shares accordingly paid into one or other of the banking houses the first instalment of 5*l.* on their several shares, and received in exchange paper scrip receipts, and the sums so paid were carried to the account of the directors with such banking houses. That the plaintiff purchased at various times, for valuable consideration, 2000 of the 11,210 shares, upon which 2000 shares the said first instalment of 5*l.* per share had been duly paid, and he had ever since been, and now was, the holder of such shares.

The bill went on to state that the application for shares, before and after they were appropriated and allotted, became general and urgent, and that the scrip receipts in a short time rose greatly in value, and before the said shares were appropriated, the same bore a premium of from four to nine per cent, and after the appropriation was made, the scrip receipts bore a premium of ten per cent.

The bill further stated, that since the plaintiff became a shareholder, and very lately, he had discovered, that on finding the rise which had taken place in the value of the stock, the directors, in pursuance of a private agreement among themselves, kept back and retained the remaining 8790 shares, with a view to apply to their joint use and benefit the profits to be made upon the shares so retained, and that they appropriated to applicants 11,210 shares only, although the demand on the part of the public would have exhausted a supply of 50,000 shares and upwards: That subsequently to the appropriation of those 11,210 shares, various persons applied to the directors for the purpose of having some of the remaining 8790 shares allotted to them, and would have paid the requisite instalments thereupon, but that the directors untruly stated, in answer to such applications, that the whole of the 20,000 shares, of which the stock of the association consisted, had been already disposed of.

The bill charged, that it was the duty of the directors to have paid up the instalments of 5*l.* upon the retained shares, but that they had never made any payments into the banking-houses of the association on that account, and that the first instalment upon those shares remained wholly unpaid; that the funds of the association were greatly diminished in consequence of such conduct, and that the deficiency of the proposed capital was one of the causes of the association not being properly carried on: that the directors being unwilling to pay the first instalment on the retained shares, and to bring them into the market while they were at a discount, entered into an arrangement among themselves, by which they expected to defraud the plaintiff, and the other *bonâ fide* shareholders, with a view to enhance the value of the 8790 retained shares, and to obtain an opportunity of disposing of them to their own advantage.

That in pursuance of that arrangement, they determined to reduce the whole number of shares in the association from 20,000 to 10,000, and the value of each share from 50*l.* to 15*l.*; and in order to give a colour to the reduction, and to deceive the public and the *bonâ fide* shareholders, they caused an advertisement to be inserted in the Times newspaper of the 28th of April, 1827, as follows:—"Potosi la Paz and Peruvian Mining Association." Notice is hereby given, that it has been resolved by a great majority of the proprietors of this association to reduce the number of shares from 20,000 of 50*l.* each, to 10,000 of 15*l.* each, by which

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the capital will be limited to 150,000*l.* instead of 1,000,000*l.* This resolution the directors have no hesitation to comply with, as the nature of the contracts of the mines render the amount of the original capital unnecessary. The holders of the bankers' receipts are therefore requested to apply at the office of the association, No. 1, Great Winchester Street, for the purpose of exchanging such receipts for consolidated shares, any day between the hours of ten and four o'clock, on or after the 7th of May next. By order of the board, John Channon, Secretary."

The bill further charged that no meeting of the proprietors took place preparatory to the said change, and that the assertion that the change was resolved on by a great majority of the proprietors was untrue: that the directors formed the design of selling in the shape of consolidated shares the 8790 shares which they had retained, and on which no instalments had been paid; and that they accordingly, in the month of April, 1827, signed upwards of 5000 consolidated shares, and left them with their secretary for the purpose of being disposed of.

That the consolidated shares were in form as follows: "Potosi la Paz and Peruvian Mining Association, one share, capital limited to 150,000*l.*, consolidated share 15*l.*, London, April, 1827. This is to certify that the bearer is a proprietor of the share No. , in the capital of the Potosi la Paz and Peruvian Mining Association, in April, 1825, upon which 10*l.* has been paid, which share is exchanged for a receipt No. , signed by three directors. Entered, John Channon, Secretary."

That the directors, in furtherance of the aforesaid arrangement, entered into extensive speculations with respect to consolidated shares, and employed certain agents, whose names were unknown to the plaintiff, who were to watch the value of those shares in the market, and to sell them when the price was at the highest, for the benefit of the directors, and that 4000 and upwards of such shares were sold accordingly, and the profits arising therefrom received by the directors for their joint use and benefit.

That each of such consolidated shares represented that the instalments of 10*l.* had been paid thereon, and that the same was exchanged for receipts as herein-before set forth, but that such representations were untrue. That scrip receipts for 2000 shares were sent in by *bonâ fide* holders, and were exchanged for 1000 consolidated shares, and that the plaintiff at various times became the holder for valuable consideration of 1000 consolidated shares, for which scrip receipts appeared to have been duly exchanged by the *bonâ fide* holders thereof, and that he had ever since been, and then was, the holder of such consolidated shares.

The bill also contained a charge that the shareholders were so numerous that they could not be made parties to the suit, and that their names and places of abode were unknown to the plaintiff.

The bill prayed a declaration that the directors had been guilty of a fraud upon the plaintiff and the other shareholders in not paying up the instalments of 5*l.* per share upon the 8790 shares retained by them, and that they were jointly and severally liable to pay and make good to the association, either the sum of 43,950*l.*, being 5*l.* per share upon that number of shares, or otherwise, the sum of 40,000*l.*, being 10*l.* per cent upon the 4000 consolidated shares, with interest at five per cent, into one of the said banking-houses, on account of the association.

To this bill all the directors, with the exception of Hunter, who had

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subsequently to the formation of the association become a bankrupt and obtained his certificate, were made defendants.

Several of the defendants put in a general demurrer for want of equity; and they further demurred, on the ground that the rest of the shareholders, and the assignees of the director Hunter, were not before the court. A demurrer was also taken *ore tenus*, on the ground that the original holders of whom the plaintiff purchased his derivative shares were not made parties.

Mr. Tinney, Mr. Skirrow, Mr. Wright, Mr. Lloyd, and Mr. Wigram, for the different parties who demurred:

Although the Bubble Act* is now repealed, that act was declaratory only. This association is illegal at common law; the King *v.* Dodd, 9 East, 516; Josephs *v.* Pebrer, 3 B. & C. 639, and a court of equity will not recognise or assist it. The multitude of the parties in a joint stock company of this description, the impossibility, where the company is not incorporated by act of parliament or royal charter, of doing complete justice between the different partners, and the open encouragement which it consequently holds out to every species of fraud and dishonesty, render it nothing better than a public nuisance, which courts of equity, instead of upholding, will be disposed to check and discountenance. That was the view taken by Lord Eldon in the analogous case of Vansandau *v.* Moore, 1 Russ. 441, as well as in Kinder *v.* Taylor,† and Lord Tenterden's opinion seems to have been similar, Josephs *v.* Pebrer, 3 B. & C. 639. The clause contained in this prospectus, that no proprietor should be liable beyond the amount of his shares, is a fraud upon the world, and an attempt to evade the salutary principle upon which every partner is liable for the whole debts of the concern. The shares are stated to amount to 20,000, and the number of shareholders must be very great; so great as to make it hopeless ever to bring a cause to which they are all parties, to a hearing. The single exception to the rule with respect to parties, is where, as in Lloyd *v.* Loaring, 6 Ves. 773, one partner who can represent the rights and interests of all, contests them against a stranger. But here the act of the directors in consolidating the shares was perfectly valid against such proprietors as consented or did not complain, though bad against others who refused their consent. There is, therefore, a particular equity among the several partners, differing, it may be, in each individual case; and as it is impossible to do complete justice, without making all the shareholders parties, so, on the other hand, it is equally impossible, from the nature of the company, and the number of its partners, to bring all those shareholders before the court, much more to bring them to a hearing; and that, of itself, is a sufficient reason why the court, finding its powers inadequate to grapple effectually with a subject of such magnitude, should refuse to entertain the suit at all.

Supposing, however, that difficulty could be got over, still it is manifest that there are in this concern two classes of persons whose interests are distinct, and very probably opposed, the holders of original and the holders of consolidated shares, whose respective situations and equities

* 6 G. 1. c. 18; the eighteenth, nineteenth and twentieth sections of which (relating to *projects*) were repealed by the 6 G. 4. c. 91.

† Not reported; but part of Lord Eldon's judgment is given in Collier's Law of Partnership, Appendix, No. XI.

must be totally different, and yet the present plaintiff takes upon himself to represent and sustain the interests of both classes.

This is a mere partnership for the conduct of a mining speculation, and the case made is one of fraud against certain of the members. Now, it is settled, that one partner cannot by a bill bring the management of the partnership transactions before the court, without at the same time praying a dissolution. The doctrine of Lord Eldon, in Forman *v.* Homfray, 2 V. & B. 329, has been since followed by his lordship in Kinder *v.* Taylor, and by the Vice-Chancellor in Russell *v.* Luscombe, 4 Sim. 8; and the decision in Harrison, *v.* Armitage, 4 Mad. 143, if properly understood, rather confirms than impeaches the principle. The case of Hichens *v.* Congreve, 4 Russ. 562, which will be relied upon on the other side, is really no exception to the rule; for there every shareholder stood precisely in the same situation, and the directors were trustees for the whole society, so that substantially the bill sought nothing but to enforce the contract of the shareholders.

As to certain shares, the plaintiff states himself to have purchased them from other persons, who were the original holders, but he does not state (and the fact is known to be directly otherwise) that the sanction necessary to complete his title, has been given by the directors to the transfer, and till that has been obtained, the plaintiff can have no *locus standi* here, suing as an alleged partner, whatever remedy he might have against the persons of whom he purchased.

It is not alleged, nor does it appear upon this bill that the Potosi Mining Association is a subsisting concern. In point of fact, its operations have long since ceased; and it is vain and ridiculous now to pray, that sums of money may be paid into a banking-house, for the benefit of a partnership which has been virtually broken up and abandoned.

Besides the general objection already urged for want of parties, there are other objections of a similar kind, though less extensive in their nature. There is a distinct demurrer, on the ground that the assignees of the bankrupt director, Hunter, are not made defendants; and what is still more material, the persons from whom the plaintiff obtained his derivative shares, some of which are stated to be consolidated, are not before the court. Now if the case of fraud and breach of trust, made by the bill, be good against the rest of the directors, it must be equally good against Hunter, and the defendants are entitled to have the representatives of their co-trustee brought before the court, that his estate may be charged with his proportion of the liability. Again, it is a settled rule in pleading, that whenever the title to equitable rights is in question, the legal owner must be made a party: the equitable owner alone cannot sustain the interests in contest, because there may be equities affecting the former, by all of which the assignee will be bound. Redesdale on Pleading, page 179, 4th edit.; Cathcart *v.* Lewis, 1 Ves. jun. 463. The title of the plaintiff to his derivative shares, whether consolidated or not, is merely equitable, Perring *v.* Hone, 4 Bingh. 28, the more so as it is not stated to have been perfected by receiving the sanction of the directors: in equity he stands precisely in the same situation as his assignors, the legal owners, who, for any thing that appears, may have been consenting parties to the consolidation, and who ought, in justice to the directors, to be specified by name, and brought before the court, that the directors may be able to set up in their defence whatever equities may exist capable of affecting them. Blain *v.* Agar, 1 Sim. 37.

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Sir E. Sugden and Mr. G. Richards, in support of the bill:

Joint stock companies of this description are now perfectly legal, whatever they may have been while the Bubble Act was in force. Lord Eldon, it is well known, had a strong prejudice against them, which he expressed in Vansandau *v.* Moore, and Kinder *v.* Taylor; but even he felt bound to recognise and uphold them when they were brought judicially before him. Indeed, the numerous private acts passed for incorporating similar associations (the Arigna Mining Company for example), which, if they were a nuisance or a violation of the common law, never could have obtained the sanction of the judges and the legislature, prove that there is nothing unlawful in their character.

The clause attempting to restrict the liability of the shareholders, till confirmed by parliament, was of course only binding among themselves, and nugatory as to strangers; but it is clear from The King *v.* Webb, 14 East, 405, and Pratt *v.* Hutchinson, 15 East, 511, that its insertion in the prospectus, or even in the partnership deed, could not affect the general legality of the company or its acts. It is because such companies are legal, and are considered beneficial to the community, that parliament invests them with extraordinary powers and privileges, and enables them to sue and be sued by their secretary, in a manner unknown to the common law.

If this were a bill seeking to administer the equities between the different partners, the argument that all the shareholders are not before the court might have some weight; though even then, where it is necessary for the purposes of substantial judgment, the court has been frequently induced to relax the rigour of the rule, and has allowed the interests of a large body of proprietors to be represented by a few, leaving the rest to come in and prosecute their rights under the decree. Adair *v.* New River Company, 11 Ves. 429; Cockburn *v.* Thompson, 16 Ves. 322; Good *v.* Blewitt, 13 Ves. 397; Gray *v.* Chaplin, 2 Sim. & Stu. 267; Bromley *v.* Smith, 1 Sim. 8; Blain *v.* Agar, 2 Sim. 289, and the late case of Small *v.* Attwood, 1 Younge, 407, in the Exchequer, where the same objection was strenuously urged, but without success. But here the argument has no application; for the object of this suit is not to administer the equities between the individual partners, or between the various classes of shareholders, but to restore to the partnership fund, for the benefit of the whole body of proprietors according to their respective interests, sums which a fraudulent contrivance of the directors has enabled them to abstract, and appropriate to their own use. Hichens *v.* Congreve, 4 Russ. 562, where this very ground was taken and overruled, is a direct authority for the frame of the present suit, and it furnishes a complete answer to the objection that the bill contains no prayer for a dissolution. Such a prayer would have been destructive of the very purpose of the suit, a suit not for a general account, but seeking to charge persons, in the character of trustees, with a breach of trust for which they are responsible to their constituents, the partnership at large.

The plaintiff states himself to be the holder of certain shares, some original, and others derivative, in the Potosi Mining Association, and upon that general statement, until the contrary is shown, the court is bound to presume that the plaintiff has done every thing formally and regularly in order to qualify himself as a partner, and that his title is lawful and complete. If the fact were otherwise, it could only be taken advantage of by a plea, or established by evidence at the hearing. For a similar reason

it was quite unnecessary, and would have been improper for the plaintiff to specify minutely and in detail, the manner in which he obtained the different shares, and the names of the persons of whom they were severally purchased; more especially in a bill which has for its object, not to set up any private claims of the plaintiff's own against the partnership, but to call upon trustees guilty of a fraud, to account to the general body of the partners for the profits arising from the breach of trust. If, then, the assignment be, as it must be assumed to be, complete, it is a mistake to suppose that any interest, legal or equitable, still remains in the assignors. By the very act of transfer a change in the partnership was effected, *quoad* the rights and liabilities of the original holders, and a new partnership created: their entire interest, legal as well as equitable, was thereby conveyed to their assignee, who thereupon became to all intents a partner, both at law and in equity, to the extent of the assigned shares. With respect to the absence of Hunter's assignees, it is perfectly settled that it is competent for a *cestui que trust*, suing for a breach of trust committed by several trustees, to proceed against any of them at his discretion. Walker *v.* Symonds, 3 Swan. 1. It will still be open to the plaintiff, after he has established the amount of the claim in this suit, to go before the commissioners in bankruptcy, if he chooses, and prove for it against Hunter's estate.

Mr. Tinney, in reply.

December 12.—The Lord Chancellor:—I am of opinion that this demurrer must be allowed.

If I had only agreed with the defendants in the point made of the company being illegal at common law, independently of the 6 G. 1. now repealed, or had thought that question doubtful, I might have been disposed to let the case proceed, by disallowing the demurrer, and suffering the point to be afterwards raised and decided. Had the demurrer rested there, however, there seems to be no reason for allowing it.

To hold such a company illegal, would be to say that every joint stock company not incorporated by charter or act of parliament is unlawful, and, indeed, indictable as a nuisance, and to decide this for the first time, no authority of a decided case being produced for such a doctrine. The clause intimating that each subscriber is only to be liable to the extent of his share is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice. In that light it is not to be viewed as criminal or as a means of deception; for the publicity of it may tend to inform such as deal with the company, and a proof of that publicity in the neighbourhood of parties so dealing might go to fix them with notice. For any other purpose, for the purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, would have himself to blame, and be the victim of his ignorance of the known law of the land.

On this ground, then, I do not think the demurrer can be sustained. Nor do I think it can be sustained upon the other ground, that the bill does not pray for a dissolution of partnership; for this is no suit for a general account, but only a complaint of a fraud. Neither can it be held demurrable on account of the non-joinder of Hunter's assignees as defendants, for the defendants were severally liable; nor on account of

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the other shareholders not being made parties, after the decision by Lord Lyndhurst, in Hichens *v.* Congreve, acted upon, as I have understood, more recently in Small *v.* Attwood; to say nothing of the class of cases where the making all partners parties has been dispensed with, in companies of which the shareholders are so numerous as to render that impossible, or at least highly inconvenient.

But there is one ground of demurrer which I cannot get over. The plaintiff alleges his title to *be as a shareholder by purchase*, and he does not set forth how. He does not derive his title. He merely says that he purchased for valuable consideration divers shares, upon which the instalment of 5 per cent had been paid, and that he ever since has been, and now is, the holder of such shares. Now in another part of the bill it is alleged, that by the rules of the association, as set forth in the prospectus, no transfer of shares could be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument, binding him to observe the regulations. Is this merely directory, or is it a condition precedent? I am of opinion, that it is a condition precedent, and that the performance of it should have been alleged. A demurrer, it is true, admits all facts that are well pleaded; and it is contended, that here the allegation of the plaintiff having purchased shares and being a shareholder is admitted, and that therefore the rules must be assumed to have been complied with. Nothing to the contrary appears on the face of the bill, to which, of course, we are confined. This, however, depends wholly upon the purchase and holding of the shares being well pleaded. But shareholding is not sufficiently known in the law to make the mere allegation of it intelligible without more. Nor are shares, or the purchase of shares, things known in law. The shares may be any thing, and may be quite different in different companies; the modes of holding them may be divers. The manner of transferring them may be indefinitely varied, even where the interest is one recognised by law, and the thing is well known; as in the case of the transfer of a bill of exchange, which is a transfer of a chose in action legalized by express enactment, or the case of an assignment of a reversion at law, the title of the plaintiff must be set forth specially, and if there be any conditions precedent, the performance of them must be alleged.

Even if the demurrer on this ground should be overruled upon the argument that it was sufficient to allege the shareholding, the defendants would only be driven to raise the same question in a different shape by pleading. But as I have no doubt that the allegation here is imperfect, and consequently the shareholding not admitted by the demurrer, I must consider the case on the omission of the material affirmation that the condition precedent had been performed, and it therefore stands that the plaintiff has not alleged any title. The demurrer is, perhaps, sustainable upon the other ground,—that those from whom the plaintiff bought have not been made parties. But into this there is no occasion for entering, as it was not set down among the special grounds of demurrer.

Nothwithstanding the Lord Chancellor's judgment, by which the demurrer was allowed, and the bill, as to several of the directors, was out of court, the plaintiff proceeded with the suit against the four who had not demurred, Messrs. Tennyson, Russell, E. Lousada, and Thiselton; and they having, by the schedule annexed to their answer, admitted that certain books and documents which were the joint property of them and

the other directors, and related to the matters stated in the bill, were in the custody of their solicitor, Mr. Gregson, as the agent of the directors; an order was made by the Vice-Chancellor that the plaintiff should have those papers and documents produced, and have liberty to inspect them in the usual way.

June 20, 1833.—The Attorney-General moved to discharge the Vice-Chancellor's order.

Sir E. Sugden, for the plaintiff, opposed the motion.

As the main topics of argument used on both sides were more fully urged afterwards in the application to stay execution of the order, pending an appeal to the House of Lords, it is unnecessary to repeat them here.

The Lord Chancellor refused the motion with costs.

November 16.—A motion was now made on behalf of the defendants, that all proceedings to enforce production of the books and documents in question might be stayed pending an appeal which had been presented to the House of Lords against the order directing them to be produced.

The Attorney-General and Mr. Wigram, for the motion.

The original order was opposed on two grounds; first, because it appeared from the defendants' answers, as well as from the bill itself, that the property in these books and papers was a joint property, Gregson being the common agent both of the directors who demurred, and of those who answered, and that the former, who had withdrawn their business from Gregson, and now employed a different solicitor, were entitled to call upon Gregson at his peril not to deliver them up or publish them to strangers. Another ground was, that the discovery in such a suit could only be granted as incidental to the relief; and that here, inasmuch as several of the directors, who stood precisely in the situation of these defendants, had already on demurrer had the bill dismissed as against them for want of equity, and the order of dismissal had been submitted to without appeal, it was utterly impossible that any relief could be given at the hearing against the four directors whose names still remained on the record.

In support of the present application it is enough to show, first, that a *bonâ fide* and substantial appeal has been presented to the House of Lords, against the order by which the production is directed; and, secondly, that the enforcement of that order would, as matters now stand, occasion serious and irreparable mischief.

Upon the first point, the affidavits show that a petition of appeal has been regularly presented to the House of Lords, and that the cause now stands in the list of appeals for hearing. To satisfy the court that this is a substantial appeal it will be enough to refer to the arguments urged without success, upon the motion in June last. How far, when of several individuals having a joint property in documents, some only are before the court, an order can be made compelling the production of those documents at the instance of a stranger, without the consent, and to the prejudice of such owners as are not parties to the suit, is a question certainly of nicety and novelty, and well deserving, from its importance to the parties, and for the sake of the principle, to be submitted to the judgment of the highest tribunal in the country. In the present state of the

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record it is impossible to conceive how relief can be given at the hearing, and as the discovery is allowed only as incidental to the relief, it would be absurd and inconsistent with principle to compel a production of documents, which can never be made available in the cause.

Upon the second point, to prove that the damage is serious and irremediable, the order under appeal needs only to be stated. The instant the books are produced, the mischief is done: the whole object of the plaintiff's application is gained, and no order of the House of Lords, no security to be given or act to be done by the plaintiff, can ever by possibility restore the appellants, if they are successful, to their original situation. This, therefore, is infinitely stronger than the cases in which decrees involving the payment of sums of money have been directed to be stayed, pending an appeal. There the money may be paid back or security may be given for its repayment; but here, once permit the production and inspection of the documents, and the appeal itself becomes futile, because even success would be fruitless.*

Sir E. Sugden opposed the application.

December 20.—The Lord Chancellor:—This was a motion to stay, pending an appeal to the House of Lords, the execution of an order obtained on the 20th June last, calling upon four of the defendants, Messrs. Tennyson, Russell, Lousada, and Thiselton, to produce and give to the plaintiff access to the books and papers set forth in a schedule to their answer, and admitted by them to be in the possession and custody of Mr. Gregson, who is also admitted by them to be their solicitor. It is further admitted by them, that those books and papers relate to the matters in the plaintiff's bill. Thus far, then, nothing seems to be more of course than the granting the usual inspection. But it was resisted on the ground that several of the other defendants had demurred to the bill; that their demurrer had been allowed some months before the order was made; and that Mr. Gregson held the documents in question for them, as well as for the defendants who had answered, and against whom the application was made.

It is, however, to be observed, that not one of the defendants who resist the production takes upon himself to swear absolutely that he has not the power of producing. What they state is as if a party were to say, he could not produce papers because they were in his solicitor's hands, a statement which plainly could not protect him. The defendants' answer states that Mr. Gregson has the custody, as their solicitor, and also as the solicitor of the other defendants; and their affidavits state that the documents are in his custody, he being their solicitor in the cause, as well as the solicitor of others whose demurrer has been allowed; and that he, Gregson, objects to produce them, on account of a notice given him by two of the defendants who had demurred; and so, argumentatively, and by way of inference, that *under the circumstances*, the parties are unable to produce them. An affidavit to the like effect was also made by Mr. Gregson, admitting that he held the documents as solicitor in the cause for all the parties, as well those who continued such, as those whose demurrer had been allowed. It is also sworn that some of the latter have other solicitors in their employ besides Gregson, and that

* See The King of Spain *v.* Machado, 4 Russ. 560.

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through those other solicitors they have given Gregson notice, as their solicitor, not to produce the documents.

If such a defence, or such an arrangement among parties having a common interest in books and papers, were allowed to protect them against production, it is clear that means would never be wanting to evade or to defeat the jurisdiction of the court. The whole affair has essentially the appearance of a contrivance for this purpose, and it can never be suffered to prevail. One party elects to demur; another thinks it for his advantage to answer; both employ one solicitor in the cause, who holds the documents relating to it for both; but the defendant who demurs, employs another solicitor, to give his solicitor in the cause notice not to produce these, and the defendant who answers says, that his co-defendant, being no longer a party, has, by his private solicitor, given notice to the common solicitor not to produce the papers which are their common property, and to which both have the same title. Such an excuse cannot be admitted. The court has a right to give whatever access the party himself is entitled to, and as Gregson could not refuse access to the defendants who have answered, so cannot they refuse access to the plaintiffs. With respect to Mr. Gregson, he is quite safe in acting as the order of the court has called upon his clients to do and to permit.

It is said that no decree can ever be made in this cause; that the suit can never be prosecuted with effect against the parties who resist the application, or against any of the defendants, on account of the demurrer having been allowed. Admitting it to be so, and supposing it to be impossible that in this case the bill might be demurrable for want of equity, as against some parties, yet not as against others, still that is no reason for refusing the production. The argument that a plaintiff shall have no inspection of papers, on the ground that, even if he were permitted to inspect them, he would nevertheless fail in his suit, is not a valid one. But, strictly speaking, we are not here upon the merits of the motion granted in June. We are upon an application to stay execution of the order then made. It has, however, been frequently said by the court, that these applications are in the nature of re-hearings. It has also been observed, and justly, that they are not to be encouraged, because they are re-hearings without the ordinary securities and checks. This at least may safely be stated, that unless there seems strong ground for supposing that the judgment will be reversed, and a suggestion be made of remediless mischief, the execution ought not to be suspended.

It is accordingly said here, that unless the suspension is granted, the appeal will be useless: but that is by no means correct. If the evidence is now obtained by the plaintiff under the order, and it is afterwards decided that the order ought not to have been made, the evidence will go for nothing.

The court would suspend the execution of decrees and orders in very many of the cases decided, were the argument of irreparable mischief to prevail. In cases of injunction, for instance, and still more in orders dissolving injunctions, an appeal ought almost always to stay execution. Suppose an appeal against an order to pay money into the hands of a party, perhaps a foreigner, about to quit the country. I put the case of an order made upon the motion heard yesterday, and an appeal from that order: that would be a far stronger case than the present; and yet, if in that case the application were granted, it would really amount to deciding

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the matter the other way.* It would be all which the party opposing had contended for: it would give him the very stop on the fund for which he had in vain been struggling, and expose his adversary to the delay against which he had successfully striven: it would be a reversal of the decision under the form of staying execution. For it is unnecessary to remark how inevitably an appeal would follow in all such cases, when it afforded the means of frustrating what the court had determined.

Accordingly such applications are uniformly discouraged. In Huguenin *v.* Basely, 15 Ves. 180, Lord Eldon says, "that encouraging them would palsy the arm of justice;" and though in that case he made the order, in the special circumstances, and because it could not produce serious inconvenience, yet in another, Willan *v.* Willan, 16 Ves. 216, he refused it with costs, although it was clear that change of possession was the consequence, and if the motion had been granted, the party's enjoyment would only have been postponed. In one of the cases the court referred to the well-known instance of convictions, where the stay is refused from regard to the evil of breaking in upon the general rule; and notwithstanding the admitted mischief that must arise in particular cases, 8 Ves. 37.

It has been said more than once in this place, that such applications are better made in the House of Lords. And in one of the cases Lord Eldon treated such an application as a misapprehension of the party's proper course, on the ground that the Chancellor's order refusing to stay might itself be appealed from, and so on without end. He added, as another reason, that the Court of Appeal has the power of protecting the party in possession of the judgment against any vexatious delay consequent upon the stay, by advancing the cause, where it has been deemed fit to grant the application.

In the present case the appeal was entered a month after the order; and the House of Lords sat six weeks later. But leave was obtained not to lodge the case till after the end of the session. That in a question of this sort, where every thing must needs have been in perfect readiness, and the case consisted necessarily of a transcript of parts of the pleadings and of the affidavits, with about twenty lines of reason annexed, there could have been any difficulty in lodging the cases and applying to advance, seems inconceivable.

I had every inclination originally to grant this application; and if, on conferring with others whose experience gave great weight to their opinions, I had found that any doubt was entertained upon the matter of the order, or of this motion, I should probably have stayed the execution. But even then I am not sure that I should have done right; for certainly it would be giving encouragement to vexatious appeals upon a large class of the business which occupies these courts. Indeed, were

* In the case alluded to, The King of Spain *v.* Machado, heard in Lincoln's Inn Hall, December 19, 1833, on a motion to remove a stop placed upon a large sum of money which had been impounded in the Court of Common Pleas, to await the result of proceedings at law, the effect of the Lord Chancellor's order was to enable the defendant Mendizabel to obtain the uncontrolled possession of the fund. No sooner was that order pronounced, than the very application here anticipated was made, upon the ground of irremediable mischief if the money were suffered to be paid out; and his lordship, in refusing to accede to it, referred to the terms in which he had so recently refused a similar application in the case of Walburn *v.* Ingilby.

[Bolton *v.* Corporation of Liverpool.—1 Milne & Keene, 88.]

this motion granted, upon the allegation that refusing it will enable a party to do something which cannot be undone, or to obtain some advantage which can never afterwards be wrested from him, it is impossible to conceive any case of an order for paying money out of court, for dissolving an injunction, for appointing a receiver, in which, the same ground existing much more plainly, the same course must not be pursued. And thus the very cases where it is of the most essential importance that speedy execution should take place, the very cases in which this court possesses its peculiar jurisdiction because of that urgent necessity, will be those in which the argument for suspending execution will be most powerful. In other and better words, in the language of Lord Eldon, the arm of the court will indeed be palsied.

It is needless to observe, that the inconvenience which must be admitted to attend this principle, and in a great measure to render appeals nugatory, may be traced almost in the whole to the imperfect constitution of the appellate jurisdiction. If that were so constructed as to give instantaneous despatch, then, under proper regulations (for even then some restraint would be necessary) execution might generally be staid pending the appeal. The difficulty would here be, justly to arrange those regulations, so as to prevent appeals being resorted to in all cases, and the courts below being made merely stages for carrying causes to the last resort. But whether an appellate court is ever likely to be obtained, so constructed as to ensure such immediate despatch, and at the same time so composed as to obtain full confidence for its decisions, is another and a more serious question, upon which this is no place or time to enter.

I therefore feel it to be absolutely necessary that this motion should be refused, and with costs.

Bolton *v.* Corporation of Liverpool.

1 *Mylne & Keene*, 88.

On a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants by their answer admitted that they had in their custody and relating to the matters mentioned in the bill, divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and documents evidencing their title to the dues in question: Held, that the plaintiffs in equity were not entitled to an inspection of such cases or deeds.

January 23, 24; February 13, 1833.

THE plaintiffs, who were merchants and copartners in Liverpool, were defendants in an action, brought by the corporation, for the recovery of certain dues levied by the corporation upon the traders of that town. The bill was filed for the purpose of obtaining a discovery from the corporation in aid of the plaintiffs' defence to the action at law.

The bill among other things charged that divers cases had been lately submitted to counsel, for their opinion, touching the right of the corporation to receive the tolls and duties, and from which, if produced, it

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would appear that the corporation had no such right, and that all such cases were then in the possession or power of the defendants; and it further charged that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings, relating to the matters contained in the bill; and by which, if produced, the truth of those matters would appear.

The defendants, by their further answer, among other things, admitted that divers cases or statements had lately been submitted to counsel, by the corporation, for their opinion on the subject of or relating to the right of the corporation to levy and receive the dues or customs aforesaid; and that all such cases or statements were then in the possession or power of the defendants; that they had in the second schedule to their further answer annexed, and which they prayed might be taken as part thereof, set forth a list of such last mentioned cases or statements; but that such cases or statements so scheduled as aforesaid were prepared in contemplation of, and with reference to, the action in the bill mentioned, and with reference to this suit; and the defendants submitted that they ought not to be compelled to produce the same. However, the defendants denied that if such cases and statements were produced, it would appear that the corporation were well aware, or had reason to believe or suppose, or that the fact was that they had no right to levy or receive such town dues, tolls, or duties, or customs, or otherwise than as aforesaid; but that, on the contrary, it would appear that the corporation had the right as then contended for by them. The defendants further admitted that they had then, in their possession, certain grants, deeds, documents and papers, relating to the matters aforesaid, and that they had in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents and papers. But the defendants said that many of such grants, deeds and documents, were the title deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had in the said schedule particularized and distinguished which of the said grants, deeds and documents were the title deeds and documents evidencing the title of the corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents and papers.

A motion was made before the Vice-Chancellor that the plaintiffs and their agents might be at liberty to inspect and take copies of the cases or statements and documents mentioned in the defendants' further answer, and in the second and third schedules thereto. The Vice-Chancellor refused the application, except in so far as it related to certain cases submitted to counsel on the defendants' behalf many years ago, and long before the present legal proceedings were in contemplation.* And the motion was now renewed.

* 3 Sim. 467, where the facts of the case and the argument on the motion before his Honour, are very fully reported.

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Mr. Pepys and Mr. Kindersley, for the motion; and the Solicitor-General (Sir W. Horne), Sir C. Wetherell, Sir E. Sugden, and Mr. Duckworth, against it, followed respectively the same general line of argument as they had taken in the court below.

In addition to the cases cited for the plaintiff upon the original motion, reference was made to Preston *v.* Carr,* as an authority to show that upon the rule which enforces the production of cases for counsels' opinion, no distinction has ever been taken, for the purpose of confining the order to such cases as had not been prepared with reference to existing proceedings. The different topics urged by counsel in support of the application are so fully stated and discussed in the Lord Chancellor's judgment, that it has been considered unnecessary to report them in detail.

February 13.—The Lord Chancellor:—In this case, an action for tolls having been brought by the corporation against the plaintiffs in equity, the question was touching the right of the plaintiffs, who were the defendants at law, to have certain documents referred to in the schedules to their answer, produced in aid of the defence at law; and those documents being of two descriptions, raised two separate questions; the one relating to papers of various kinds, evidencing the title of the corporation to the town and lordship of Liverpool, and to the dues and customs in question; the other relating to cases and statements submitted to counsel in contemplation of and pending the present proceedings at law and in equity.

First, as to the documents evidencing title. I entertain the same view of this question which his Honour did when he refused the application. I take the principle to be this:—A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir at law cannot, in that character, call for the general inspection of deeds in the possession of a devisee.

In Lady Shaftesbury *v.* Arrowsmith, 4 Ves. 66, Lord Loughborough said "he could not find any spark of equity for such an application as that;" admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general; the party stating himself to be the heir of the body.

The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the corporation's title and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, "Prove me liable, if you can." The corporation have certain docu-

* 1 Y. & J. 175; and see also Newton *v.* Berresford, 1 Younge, 337. Whitebread *v.* Gurney, ibid. 541.

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ments which, they say, prove this liability. He cannot call for those documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are.

The case of The Princess of Wales *v.* Lord Liverpool, 1 Swan. 114. 580, was cited; and it is, perhaps, a strong case. But it is a peculiar one. Lord Eldon at first refused the application, and then granted it in the special circumstances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord Eldon, in delivering judgment upon that case, threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps, and they might, at any rate, said his lordship, be given up at the hearing; for an indemnity will not do; at least, that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted, that there the thing sought, and in substance allowed to be inspected, was not any matter collateral, but the very instrument on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His lordship may have considered the instruments as a sort of title common to both parties; but it could only be so by the one party setting them up and the other impeaching them on flaws discoverable by inspection. It must, however, be observed, that this was a kind of case in which, at law, inspection would have been given.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which his Honour arrived, when he refused inspection of those parts of the corporation's title, as being theirs, and not the plaintiffs', and not common to both.

Next with respect to the cases sought to be inspected. These are the cases laid before counsel, in contemplation of the action, and pending the proceedings. Their dates come down to the 29th of October, 1831, the bill having been filed in November, 1830, and the answer sworn in December, 1831. Most of the cases were laid before counsel after the demurrer was argued; nay, after it came before me on appeal; some of them on the very eve of the present application to the Vice-Chancellor. They are sworn in the answer "to have been prepared in contemplation of and with reference to the action and suit." It is suggested, that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspection. And whether this be so in point of fact, or not, is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause can be obtained by coming to this court.

It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause.

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The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which, in all likelihood, had been laid before counsel for advice. If it be said that this court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers. But without such communication no person can safely come into a court, either to obtain redress or to defend himself.

Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour we must submit. Radcliffe *v.* Fursman, 2 Bro. P. C. 514, Toml. ed., is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the court had no right to know any thing which the record did not disclose. All the court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting, whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties.

So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to or in contemplation of, or pending the suit or action, for the purposes of which the production is sought.

The case of Preston *v.* Carr, 1 Y. & J. 175, would seem to have carried the doctrine of Radcliffe *v.* Fursman, this one most material step farther, but apparently without intending to do so, for one of the learned judges says that he agrees with those who have expressed an opinion that it should not be carried farther.

There is, however, a decision of this court since Preston *v.* Carr, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds, as to the authority of the noble and learned judge who pronounced it; I mean the case of Hughes *v.* Biddulph, 4 Russ. 190. I can see no difference between the letters there excepted

from the order to produce documents, and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client in the progress of the cause, or with reference to the cause before it was instituted. This was the line which Lord Lyndhurst drew, and I can see no difference between the statements of a case in such correspondence, and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence, might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental and cannot affect the principle; for it is clear that the case may, and in such circumstances, probably will, contain as much matter as the letters, which the client cannot safely disclose: and it may very well happen that the case prepared by the solicitor should contain more than the letters.

Vent *v.* Pacey, 4 Russ. 193, which followed two years after, though reported next in the same volume, is said to throw a doubt upon Hughes *v.* Biddulph, at least as far as regards its application to this question. In the first place, however, the Vice-Chancellor having acted on Hughes *v.* Biddulph, as regards the letters, his order was appealed from and affirmed. But next, it is said that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production, on the accidental ground mentioned of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am, therefore, upon the whole, of opinion that cases laid before counsel in the progress of a cause, and prepared in contemplation of, and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

Greenough *v.* Gaskell.

1 *Mylne & Keene*, 98.

On a bill which sought to charge a solicitor with a fraud practised on the plaintiffs in the course of proceedings on his client's behalf, the court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications, made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody.

And, generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation.

January 17. 31, 1833.

BY an order made in the month of March, 1831, in a suit for the administration of a testator's assets, a sum of 5000*l.* was directed to be lent

and advanced to one Thomas Darwell out of the fund in court, upon Darwell executing a bond for double the amount, by way of security for the repayment. Under another order, dated the 26th of the following April, a sum of 1600*l.*, being part of the aforesaid 5000*l.*, was accordingly paid to a country solicitor of the name of Gaskell, who received the money on Darwell's account, although, as was alleged, he was aware at the time that his client had not given the required security. The mistake was soon afterwards discovered, and an order made for the repayment of the money; and on Darwell failing to obey that order, an attachment issued against him, under which he was arrested. In this state of things application was made on his behalf to the plaintiffs, who were ultimately prevailed upon to join in signing and delivering to Gaskell a promissory note for 1698*l.* (which sum included a balance due for costs), and Gaskell, on receiving the note, advanced the money ordered to be replaced, and his client was immediately set at liberty. Darwell became a bankrupt shortly afterwards; and the present bill was then filed against Gaskell by the persons who had joined in executing the note, for the purpose of having it delivered up to be cancelled, and for an injunction against legal proceedings in the meantime.

The bill, after setting forth in detail the circumstances above mentioned, alleged, that the plaintiffs had been persuaded to execute the note in question, at the pressing instance and solicitation of the defendant; that the more readily to induce them to sign it, the defendant had fraudulently concealed the fact, that Darwell was then in a state of insolvency, or had committed an act of bankruptcy, and had falsely represented his client's difficulties as being temporary only, although at the time the defendant made such representations, he well knew the contrary to be the truth; and that inasmuch as the note was given for the purpose of raising the money which the court had ordered to be replaced, and that money had been originally advanced under an order improperly obtained, through the agency and management of the defendant, the defendant would himself have been held liable by the court, if Darwell had failed to repay it; and the defendant was therefore to be considered, in equity, as the principal debtor, for whom the plaintiffs were no more than sureties. The bill moreover stated a variety of facts, tending to show that the defendant, who had acted for many years, and throughout the whole of the proceedings in the administration suit, and particularly upon the orders already mentioned, as the solicitor of Darwell, must have fully known the real situation and circumstances of his client.

The defendant, by his answer, wholly denied that the note in question had been executed by the plaintiffs at his instance or entreaty, but he admitted that he had been aware of the situation and circumstances of Darwell at the time of the transaction impeached by the bill; and, in answer to a charge to that effect, he also admitted that he had in his possession divers books, &c., containing entries and memorandums, and also divers papers and letters, relative to the matters in the bill mentioned; and he set forth a list of them in a schedule. But he stated that such entries and memorandums were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for Darwell, for whom he had been professionally concerned for a number of years.

Sir E. Sugden and Mr. Koe, for the plaintiffs, now moved, by way of appeal from the Vice-Chancellor, by whom the motion had been refused,

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that the scheduled books, papers, and letters, might be produced, and that the plaintiffs might have liberty to inspect them. The privilege which entitled solicitors to withhold a discovery of matters coming to their knowledge in the course of their professional business, was a privilege granted solely for the benefit of the client, and could never be allowed to shelter a solicitor who was sought to be personally charged with a fraud.

Mr. Pepys and Mr. Spence opposed the motion.

January 31.—The Lord Chancellor this day delivered the following judgment:

We are here to consider not the case which has frequently arisen in courts of equity, and more than once since I came into this court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so, has, at different times, been a matter of controversy. And in two cases before Lord Lyndhurst, Hughes *v.* Biddulph, Vent *v.* Pacey, 4 Russ. 190. 193, and one since I sat here, Bolton *v.* Corporation of Liverpool, *ante*, p. 511, the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no general privilege or protection; he is bound to disclose all he knows, and believes, and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself.

Here the question relates to the solicitor, who is called upon to produce the entries he had made in accounts, and letters received by him, and those written (chiefly to his town agent) by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters, or entries made by him in that capacity. To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.

As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not

only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important of all communications;—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the court issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. "It would be most mischievous," said the learned judges in the Common Pleas, "if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw." 2 Brod. & Bingh. 6.

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. From the terms in which I have stated the proposition, it is manifest that several cases may arise, which, though apparently they are exceptions, yet do in reality come within it. Thus the witness, or the defendant treated as such, and called so to discover, must have learned the matter in question only as a solicitor or counsel, and in no other way: if therefore he were a party, and especially to a fraud (and the case may be put of his becoming informer after being engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally. So if you examine the cases in which the protection has been refused, until the late Nisi Prius cases (of which I shall presently speak more in detail), you will find that they all range themselves within one or other of the following heads,

[Greenough *v.* Gaskell.—1 Mylne & Keene, 98.]

which are deducible from the proposition and in strict consistency with its terms. Those apparent exceptions are, where the communication was made before the attorney was employed as such, or after his employment had ceased; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to *as a friend;* or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases); or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness, and thereby assumed another character for the occasion, and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.

I shall first advert to the cases which support the proposition, and then show that those referred to as impugning it, previously to the year 1819, come plainly within its terms on one or other of the grounds I have just stated. In a case in Skinner, Anon. p. 404, a Nisi Prius case, but before Lord Holt, an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was examined to prove it a corrupt one; but the Lord Chief Justice held him not bound to answer; and it is to be observed that the only ground there taken against the privilege was his not being a counsellor, and Lord Holt said, "it seems to be the same law of a scrivener" as, indeed, Lord Nottingham had laid down in Harvey *v.* Clayton, 2 Swan. 221, n., many years before, where he would not compel a scrivener to discover whose money he held in trust or for whom, saying, that if he did, no man could hereafter employ him, and that a man shall not be wounded through the side of his scrivener. In Gainsford *v.* Grammar, 2 Campb. 9, Lord Ellenborough would not allow an attorney to be examined touching a proposal which he had carried from his client to the plaintiff, though no suit was then pending nor in existence for several months after. His lordship gives apparently as a reason for considering that the witness was acting as an attorney, and not as an ordinary agent (the argument on the other side), that an attorney might be retained and confided in, in contemplation of a suit, but he appears to rely simply upon its being a communication made to him while professionally employed as an attorney.

This was clearly the opinion of Lord Ellenborough in other cases, of which two are reported in the fifth volume of Espinasse's Reports. In Robson *v.* Kemp, 5 Esp. 52, a solicitor being called who had been employed in preparing a warrant of attorney, and who had subscribed it as a witness, Lord Ellenborough held him not bound to answer any question touching what passed at the concoction and preparation of the instrument, for those circumstances were confided to him professionally;

and his lordship observed, that by subscribing as a witness he had only pledged himself to give evidence as to its execution. Neither would he allow him to be examined as to its destruction, the attorney having become acquainted with that only in his professional capacity, and his lordship concluded that the "one case was as much privileged as the other." And so in Brard *v.* Ackerman, 5 Esp. 119, the same eminent judge would not allow an attorney to be examined as to the particulars of a bill of exchange which had come into his possession from his client. If it be possible that this bill might have been delivered to him *post litem motam*, it is at least quite clear in the former case that the transaction had no connection whatever with any suit commenced or in contemplation, for no one can maintain without a great perversion of terms, that the warrant to confess judgment referred to a suit in the sense in which the term is used throughout the present argument.

The case of Cromack *v.* Heathcote, 2 Bro. & Bingh. 4, is the only other authority to which it is necessary to refer. It is clear and distinct, and is the only decision in bank upon the question. An attorney was there called to prove fraud in an assignment, he having been asked by the party against whom he was called, to prepare the deed, which he had refused to do, and another had then been employed. The cases were all considered, and the court held that because the party consulted the attorney professionally, and instructed him as an attorney, although after receiving such communication the latter refused to draw the deed, yet the knowledge he had was obtained in his professional capacity, and they were unanimously of opinion that there being no suit pending in any court made no difference as to the protection. Mr. Justice Richardson expressly puts the case of an attorney consulted on title, and says he never heard of the rule being confined to attorneys employed in a cause.

I have only adverted to such of the cases allowing the protection as maintain the proposition in its largest extent, and distinctly exclude the qualification of late partially introduced, of reference to legal proceedings.

But it will now be satisfactory to examine the cases in which the protection has been refused, and to find that down to Wadsworth *v.* Hamshaw they afford no real exception to the rule, but come within the description already given of exceptions only in appearance. Indeed, the greater part of them afford strong confirmation of it in the *dicta* of the judges as to how the decisions would have gone had the facts been otherwise.

In Cuts *v.* Pickering, 1 Vent. 197, where the defendant had disclosed to A. B. an erasure in a will to have been done by him, but disclosed it before A. B. was his solicitor, it was held he might be examined, but *secus*, had the disclosure been after his retainer. Lord Say's case, 10 Mod. 40, was that of an attorney employed in levying a fine, and called to prove that the deed to lead the uses was not executed till five months after the date. The court agreed that he could not be examined to prove his client's secrets, but that the execution of a deed was a fact that he might know *aliunde*, and not a secret of his client's. But here no distinction was taken as to matter disclosed in a suit, or preparatory to, or connected with a suit, and other secret or secrets otherwise learned. In Studdy *v.* Sanders, 2 Dow. & Ry. 347, an attorney's clerk was allowed to identify the client as the person who put in an answer, on the ground that this was a matter not confidentially disclosed to him. *Contrà*, in

[Greenough *v.* Gaskell.—1 Mylne & Keene, 98.]

Rex *v.* Watkinson, 2 Strange, 1122, which was an indictment for perjury assigned in an answer in Chancery, where the Master who took it could not identify the defendant, the solicitor who was present when it was sworn, was called, and as the Chief Justice would not compel him to give evidence, the defendant was acquitted. Yet there the identity must have been known to many others, and the putting in the answer so far from being a secret disclosed, was in its very nature a matter of publicity. This case then I take not to be law at the present day. Indeed, Lord Mansfield says in Doe *v.* Andrews, he has known an attorney examined to prove that his client swore and signed an answer on which the latter was indicted for perjury. In Doe *v.* Andrews, Cowp. 845, in consequence of an attorney who was an attesting witness to an agreement, refusing to prove it, there was a nonsuit. But the court afterwards set aside the nonsuit, holding that the attorney was bound to give evidence on collateral points, and that whoever becomes a witness to an instrument pledges himself to give evidence on it whenever called upon. There the attorney had been mixed up with the transaction, and had acted not as a professional man: for though attorneys often witness deeds, that is accidental, and they do so not as attorneys. He had made himself, as Lord Ellenborough says in one of the Nisi Prius cases, "a public man" as to proving the execution, and not an attorney. Cobden *v.* Kendrick, 4 T. R. 431, was the case of a communication from client to attorney after the action was compromised, and it was held not privileged: clearly, because it was not made professionally, but by way of idle and useless conversation, the words being, "I am glad it has been settled, for I only gave 10*l.* and my note; it was a lottery transaction." Had this been confided with a view to some further proceedings, or, without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected. In Duffin *v.* Smith, Peake, 108, usury in a mortgage was proved by the plaintiff's attorney who prepared the deed, and who was called by the defendant to prove the consideration usurious; and Lord Kenyon in that case said, that "when the attorney himself is as it were a party to the original transaction, *that* does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person."

It may be doubted if the attorney preparing the deed be not confidentially entrusted as an attorney in so doing. But Lord Kenyon proceeds upon the assumption that he is not; that on the contrary he is *quasi* party, and he seems to liken the case to that of a co-conspirator, where clearly there is no protection. Had he not deemed him the party acting, rather than the attorney entrusted, the principal rather than the agent, it is plain that his lordship would have held him exempt from interrogation. In Wilson *v.* Rastall, 4 T. R. 753, an attorney was held compellable to produce letters committed to him by the wife of another witness, who had, he said, consulted him in his profession as a confidential person, both before and after the wife gave him the letters; the letters, though not given by him, were kept with his privity and consent; and the witness himself said that they were committed to him in consequence of the defendant consulting him professionally. But then he also said that he was under-sheriff, and had, on this account, refused to be employed as an attorney. And, therefore, all that could be said was, that he had been confidentially consulted by a friend, who selected him for this purpose because of his professional knowledge. The court, and particularly Buller

J., put the decision upon this ground, that the letters were not given to him in his professional capacity.

So stand the authorities on both sides, or I should rather say, all substantially on one side, previously to the year 1819; the date of the first case I can find, in which the rule was laid down with the qualification that the communication must relate to a cause. That is also the case in which the qualification is stated the most largely, or with the greatest effect upon the rule.

The case I allude to, is a Nisi Prius decision of Lord Tenterden at Guildhall, Wadsworth *v.* Hamshaw, given in a note to Cromack *v.* Heathcote, 2 Brod. & Bingh. 5. The question was, whether the defendants were partners at the time when certain goods were delivered, and their attorney was produced by the plaintiff to prove that they had called upon him to advise them professionally respecting the dissolution of their partnership. The Lord Chief Justice considered that this was not a privileged communication, holding that the protection extended to those communications, which relate to a cause existing at the time of such communication, or then about to be commenced, and he cited a case from the Midland Circuit, which came on motion into the King's Bench, a case to which he frequently referred upon questions of this kind, and of which a better account is to be found in Clark *v.* Clark, 2 Moo. & Malk. 3. Lord Tenterden, as I have often heard him say, was disposed to hold this privilege more strictly, that is, to allow it more sparingly than other judges; indeed, he makes a similar remark in one of the cases reported, but in none did he ever lay the rule down with so large an exception as here, and from what he afterwards says in Clark *v.* Clark, it can hardly be doubted that the report makes him restrict the privilege more than he intended.

It would follow from the decision in Wadsworth *v.* Hamshaw, if the words are to be taken literally, that a communication, however confidential, made to a professional man, with a view to the client's defence against any proceedings which might be commenced, would be without protection, because the disclosure was not on the eve of the suit.

The same doctrine is re-affirmed, though not, perhaps, quite so largely, in Williams and Mundie. (Ry. & Mood. 34.) That also was a case at Guildhall, occurring a few years after the former (in 1824), from which it only differs, inasmuch as the attorney was consulted by the defendants relative to the commencement, and not to the dissolution of the partnership, which, as before, was the matter in question. And here Lord Tenterden allowed the examination, but stated the rule somewhat less strictly against the protection. "I have invariably laid down," says his lordship, "that what is communicated for the purpose of bringing an action or suit relating to a cause or suit existing at the time of the communication, is confidential and privileged, but what any attorney learns otherwise than for the purpose of a cause or suit he is bound to communicate."

It may be fairly said, taking these two cases together, that his lordship would not have excluded communications made with a view to legal proceedings, though none such had either been commenced or were about to be instituted. Lord Wynford, who, in Broad *v.* Pitt, 1 Moo. & Malk. 234, adopts the doctrine, appears so to understand the case, for he says it is enough if a proceeding is instituted or apprehended. In the case before him, however, though Lord Wynford approves of the rule, no decision can be said to have been made, for the counsel for the plaintiff preferred proving their case by other evidence not open to the same

[Greenough *v.* Gaskell.—1 Mylne & Keene, 98.]

objection, and did not press for the disclosure, although the court had ruled that they might have it.

When a judge of such eminence as Lord Tenterden states that, "the question is one to which he has given great consideration," Ry. & Mood. 35, even the contrary current of other decisions would leave the court under considerable anxiety in departing from so high an authority; and it is therefore very material to inquire if the opinion ascribed to his lordship has not been either reported by others, or propounded by himself in the course of Nisi Prius proceedings, with somewhat of looseness, or, which would be as satisfactory, to ascertain that he was subsequently disposed to modify that opinion, supposing it to have been accurately represented in the first instance.

In Clark *v.* Clark, 2 Moo. & Malk. 3, the attorney was called to prove a communication with him, when consulted upon a transaction, for the purpose of showing that transaction to be fraudulent. A dispute had arisen between the parties, but there were no proceedings pending, nor, it should seem, in preparation or contemplated. The plaintiff only consulted his attorney as to his rights, and put one of the documents connected with the transaction into his hands to get it stamped. Lord Tenterden held that the protection extended to this case. His lordship upon that occasion, referring to the reports, intimates an impression as existing in his mind that he had been made to state the rule more narrowly than he was likely to have laid it down; he allows that he has been more inclined to restrict it than other judges, and refers again to the case from the Midland Circuit, in a way which proves that case to have gone on the undeniable proposition that the communication, to be protected, must be made to the attorney in his professional capacity; and he concludes by holding the communication in the case before him to be privileged, because it was made to the attorney in his professional character, with respect to a matter then in dispute, although no cause was in existence with respect to it.

But the distinction here taken between dispute and no dispute having arisen, cannot be found in the cases; and neither Lord Tenterden himself, nor the rest of the Court of King's Bench, could have taken it into their consideration in Bramwell *v.* Lucas; for, if so, it would have put an end to the question there, and have precluded the necessity of a very difficult and nice inquiry as to the nature of the communication. The question related to an act of bankruptcy; and though bankruptcy, when proceeded upon, may be considered as a suit, yet the act itself, out of which the proceedings may arise, is nothing of the kind; nor could any dispute be said to exist, for the fact happened before the parties to the dispute, the assignees and petitioning creditor, could have any existence.

This case of Bramwell *v.* Lucas closes the examination of the authorities, which I have felt called upon to institute; and it not only proves nothing against the general doctrine on which I have rested my opinion, but it comes distinctly within the principle stated, and ranges itself with all the rest of what I have termed the only apparent exceptions.

In Bramwell *v.* Lucas, 2 B. & C. 745, an attorney of the name of Scott was called to prove his client's act of bankruptcy, by relating that a meeting of creditors having been appointed, the client Noakes asked him if he (Noakes) could safely attend without being arrested; and Scott advised Noakes to remain in his office till he could ascertain that they would give him safe conduct, and that Noakes accordingly remained two hours there to avoid arrest. Lord Tenterden, in delivering the judgment of

the court, says that the privilege is confined to communications made to an attorney, in his character of attorney, and that this was a question which might have been asked of any one else, and the information or advice might have been given by any one else as well as by an attorney; "he recommended Noakes, not as a legal adviser, but as any agent or any friend might have recommended him, to stay where he was till a certain matter of fact could be ascertained."

This decision, therefore, went upon the ground that the communication which passed between the parties was not professional as regarded the attorney. There may be some doubt whether the view of the fact taken by the court was not somewhat bottomed in a refinement,—whether the communication with Noakes was, in point of fact, in Scott's professional capacity. But the doctrine of law laid down in the case is free from all doubt: it is, that the privilege shall be excluded, where the communication is not made or received professionally and in the usual course of business.

The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are the same on both sides of the hall; the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same. Nor do I believe that there will be found any difference of opinion upon the question in the different courts.

Thompson *v.* Andrews.

1 *Mylne & Keene*, 116.

Where a testator directs his trade to be carried on after his death, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade.

November 19, 1832.

BY an indenture, dated the 1st of January, 1817, a certain messuage, with the brewhouse therewith used and occupied, was demised to Thomas Rivers, his executors, administrators and assigns, for the term of forty-eight years, at the yearly rent of 21*l.* 5*s.* Thomas Rivers, who was a brewer and coal-merchant, occupied and used the demised premises for the purposes of his trades, and was in possession of them at the time of making his will and of his decease. His will, dated the 1st of June, 1820, contained the following clause:—"It is my wish, that my wife and my son should continue to carry on the business, in the same way that I do now, for their joint benefit and mutual advantage, on the premises in which I now reside; and in furtherance of this my wish, I give and bequeath all my stock in trade, of what nature or kind soever and by me employed or used, to my said wife and son Thomas, in equal shares and proportions; but in case of disputes or controversies arising between my said wife and son, so that it shall be deemed expedient by my trustees hereinafter named, with the consent and approbation of my said wife

[Thompson *v.* Andrews.—1 Mylne & Keene, 116.]

testified in writing, that the said business should be discontinued and no longer carried on by my said wife and son; then I give and bequeath the lease of the said premises in which I now reside, with the appurtenances thereunto belonging, and all the said stock in trade so by me given to my said wife and son, unto Richard Andrews and William Goldhawk, their heirs, executors, administrators and assigns, upon trust to sell and dispose of the same either by public auction or private contract, as they in their discretion shall think for the most advantage; and, for facilitating the sale thereof, I declare that the receipts of my said trustees shall be a good and sufficient discharge to any person purchasing the same; and, subject to the payment of the incidental charges attending the sale thereof, I give one moiety of the produce thereof to my son, the said Thomas Rivers, and the other moiety thereof I direct my said trustees to invest in their own names in some or one of the government funds of this kingdom, and pay the annual dividends thereof into the proper hands of my said wife for her life; and from and after her decease, I give the said moiety to my two children, Edward and Elizabeth, for their use and benefit, in equal shares and proportions, as they shall respectively attain their age of twenty-one years." And the testator appointed his said wife and the said Richard Andrews and William Goldhawk executors of his will.

The testator died in April, 1821, leaving Ann Rivers his widow, and the three children mentioned in his will, surviving him. The widow, and the testator's son Thomas Rivers, continued to carry on the testator's trades of a brewer and coal-merchant, in pursuance of the directions of the will, until April, 1830, when they became insolvent, and some of their creditors agreed to accept a composition for their debts, and to grant them a letter of license for two months, upon condition that before the expiration of that time they should execute an assignment of their effects for the benefit of their creditors. The brewery and leasehold premises, together with the partnership stock and effects, were advertised to be sold, and, for the purpose of facilitating the sale, an agreement, dated the 13th of May, 1830, was executed by Ann Rivers and Thomas Rivers, whereby, after reciting that disputes and controversies had arisen between them, they agreed that the partnership subsisting between them should cease and be dissolved, and that the lease of the premises in which the business had been carried on, and the stock in trade, should be sold by the trustees, in conformity with the directions contained in the will of Thomas Rivers, the testator.

This agreement was not acted upon, and the widow and son continued to carry on the business until June, 1830, when a commission of bankrupt was issued against them. The bill was filed by the assignees under the commission against the trustees named in the will of Thomas Rivers the father, and the two younger children; and the question in the cause was, whether the whole property of the testator was liable to the partnership debts of the widow and son, or whether the gift over to the trustees took effect, and the younger children were consequently entitled to a moiety of the produce of the sale of the leasehold premises, after the death of their mother.

For the plaintiffs it was argued, that the event in which the gift over to the trustees was to take effect, namely, the dissolution of the partnership, with the consent of the trustees, upon the occurrence of disputes and controversies between the widow and son of the testator, never happened. The trustees were no parties to the agreement for a dissolu-

tion of the partnership, supposing such agreement to have been really made and acted upon. In point of fact, however, the business was continued until the bankruptcy of the partners. But even if the event in which the property was given to the trustees had happened, the gift over would be void as against creditors of the partnership, inasmuch as it was inconsistent with the policy of the law that a testator should be permitted to direct his property to be employed in trade, and at the same time withdraw a portion of that property from its liability to the consequences of bankruptcy. The leasehold premises, therefore, as well as the stock in trade, were liable to the partnership debts, and became vested in the assignees of the bankrupts.

On the other side, it was contended that the widow and son of the testator were entitled, under the will, to the use and occupation only of the leasehold premises during the continuance of the partnership; that the trust for sale took effect either upon the execution of the agreement of the 13th of May, 1830, or upon the bankruptcy of the partners, and that in either case the gift over would be established in favour of the younger children. It had been expressly decided, that a testator was at liberty to direct his trade to be carried on after his death with a particular portion of his property, and that in such case his general assets, beyond the fund set apart for that purpose, would not be liable to the debts of the concern. *Ex parte* Garland, 10 Ves. 110.

Mr. Pemberton and Mr. Bethell, for the assignees.

Mr. Weld, for the younger children.

Mr. Barber, for the trustees.

The Master of the Rolls:—There is here no gift of the premises to the wife and son, other than for their occupation so long as they shall carry on the testator's trade; and the case of *ex parte* Garland has decided that a testator's property is liable only to the extent to which he has directed it to be embarked in his trade. The gift over will therefore take effect; but the assignees will be entitled, in right of the bankrupts, to their interests under the trust for sale.

Fenner *v.* Agutter.

1 *Mylne & Keene*, 120.

In a case of account, in which the Master had stated, that it was in his mind impossible to arrive at that degree of certainty which he was anxious to obtain, the court allowed an exception to his report upon reasonable presumption.

January 21, 22, 1833.

THIS cause came on for argument upon cross sets of exceptions to the Master's reports.

The particular circumstances out of which the questions argued upon the exceptions arose, are fully stated in the judgment.

Mr. Bickersteth for the plaintiff's exceptions.

Mr. Pemberton and Mr. T. Parker for the defendant's exceptions.

[Fenner *v.* Agutter.—1 Mylne & Keene, 120.]

February 12.—The MASTER of the ROLLS:—In or about the year 1809, a connection in business took place between the plaintiff, who was a tanner, and Mr. James Agutter, the testator of the defendant Grace Agutter, who was a currier, and such connection continued between them until the death of Mr. James Agutter, in 1825. The transactions between the plaintiff and Mr. James Agutter were not confined to their regular business, but these persons were mutually in the habit of accommodating each other with their acceptances; and Mr. Agutter having entered into partnership with his nephew, Mr. James Hopkins, the plaintiff in like manner accommodated with his acceptances the partnership firm of Agutter & Hopkins, and also Mr. James Hopkins, individually.

The present bill was filed by the plaintiff for an account of all those dealings and transactions, and on the 24th February, 1829, a decree was made referring it to the Master to take the accounts, with a direction that he should not disturb any account between the parties which he should find to have been settled.

The Master, by his report, states, that he finds that an account was settled between the parties on the 5th of October, 1815, and that a new account was opened between the parties on the 10th of April, 1821, and that such new account was also settled between the parties. But he finds from an account current appearing in the books of the plaintiff, that the plaintiff between the 17th of October, 1815, and the 10th of April, 1821, paid and advanced various sums of money, and sold and delivered goods and merchandise to and for the use and on account of the said James Agutter, amounting to the sum of 31,448*l.* 17*s.* 6*d.*, which with interest at the rate of five per cent to the date of his report, he computes to amount to the sum of 54,056*l.* 6*s.* 3*d.*: and he also finds from the said account current, that between the 24th of October, 1815, and the 10th of April, 1821, the said James Agutter paid various sums of money to and for the use and on account of the said plaintiff, amounting to the sum of 29,440*l.* 4*s.* 4*d.* which with interest at the like rate of five per cent he finds to amount to 51,278*l.* 0*s.* 9*d.*, which being deducted from the sum of 54,056*l.* 6*s.* 3*d.* leaves the sum of 2778*l.* 6*s.* 6*d.* which he finds to be due from the estate of the said James Agutter to the said plaintiff.

The Master, however, has made a note in writing, by which he states, that it is, to his mind, impossible to arrive at that degree of certainty upon the evidence in the case, which he was anxious to act upon. To this report exceptions have been taken by both parties.

The defendants by their first exception do, in effect, insist, that on the 7th of April, 1821, when two agreements are stated by the Master to have been come to between the plaintiff and Mr. Agutter, in respect of matters in which Mr. James Hopkins was implicated, and when a bill of exchange for 415*l.* 3*s.* 3*d.* was given by Mr. Agutter to the plaintiff as the balance due in accordance with their agreement, there remained nothing whatever due from Mr. Agutter to the plaintiff on any other account.

In order to support the conclusion of the Master it is contended for the plaintiff, that although upon many or most occasions, Mr. Agutter did pay at or about the time when goods were sold to him by the plaintiff, the precise sum due on particular parcels of goods; yet his practice in that respect was not uniform, and that it is to be inferred that the balance found due by the Master was left unpaid to the plaintiff in respect of goods sold to him. It is manifest from particular statements of

accounts which were before the Master, and are to be found in the correspondence which is in evidence, that the payment for goods was frequently mixed with accommodation bill transactions, and very few bills are introduced into the account current upon which the Master has proceeded, and it is therefore no matter of surprise that the Master felt the difficulty which he has expressed in coming to any certain conclusion.

The correspondence referred to consists for the most part of letters written from time to time by Mr. Agutter to the plaintiff, with some few letters from the plaintiff to Mr. Agutter, all which were produced by the plaintiff, and I am not aware of any better way to arrive at the truth in this case, than by examining the language of the correspondence for the purpose of seeing whether it is consistent with the notion that a balance in respect of goods was, from time to time, between the 17th of October, 1815, and 10th of April, 1821, due from Mr. Agutter to the plaintiff, gradually increasing to the large amount stated by the Master.

For the plaintiff it is said, that by a letter written by him to Mr. Agutter, dated the 13th of October, 1821, he states that he was determined to go through the accounts and to close all; and that Mr. Agutter by his answer, dated the 15th of the same month, stated his wish to go over the account, thereby admitting an unsettled account, but added, "I think you will find one account paid twice, and that you owe me a balance." Mr. Agutter by a previous letter to the plaintiff, dated the 3d of August, 1821, had used the following expressions: "You have for upwards of six months promised me you would send me all my acceptances; our lives are uncertain, and if these bills are not given up, it may cause some dispute to those that come after us." It is plain, that it is to this account of acceptances that the plaintiff refers in his letter of the 3d of August, 1821, as he adds there to his determination to go through the accounts, "I am quite of your mind that life is very uncertain with us;" and in a prior part of that letter he says, "as to giving up bills and saying all is right between us, I cannot, until I can see to the settlement." It is evident, therefore, that the plaintiff, when he speaks of accounts, means the accounts of accommodation transactions, and has no reference to any unsettled account of goods delivered, and that the fair inference from these particular letters is against the inference of any increasing debt from Mr. Agutter to the plaintiff. I have read every word of this most voluminous correspondence, and my conclusion is, that the language of this correspondence is altogether inconsistent with the Master's notion, that goods continued unpaid for, between the periods which he has stated, to the amount of the balance which he has found to be due.

The letters in the correspondence, to which I more particularly refer, are numbered in the copy of correspondence as follows:—No. 6, 22, 23, 24, 33, 38, 40, 47, 52, 56, 63, 64, 65, 148, 82, 128, 87, 92, 93, 94, 98, 108, 157, 133, 142.

(His Honour proceeded to read passages from the several letters referred to, making his comments upon each, and then continued as follows:)

In addition to the inferences arising from these several letters it is to be observed, that on the opening of the new account in the plaintiff's books on the 10th of April, 1821, there is no statement of any balance remaining due on the former account. This new account is in consequence of the two agreements which settled all the transactions between the plaintiff and Mr. Agutter, in which James Hopkins was implicated.

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The new account has no reference to James Hopkins, and it is difficult to understand why a new account between the plaintiff and Mr. Agutter should be opened, because a distinct account, with respect to James Hopkins, had been then settled, if there remained a long unsettled account between the plaintiff and Mr. Agutter. The reasonable inference is, that the new account was opened because the old account was closed, and that the only unsettled account between the parties was the account of transactions in which Hopkins was implicated, and which was arranged by the two agreements then concluded.

Upon the whole, although I admit with the Master that it is not possible in this case to arrive at absolute certainty, yet the reasonable presumptions are sufficiently forcible to satisfy my mind that no balance remained due on the 10th of April, 1821, in respect of transactions between that day and the 17th of October, 1815, and the exception of the defendants in that respect to the Master's report must be allowed.

Between James Wilson and Margaret his wife, William Crawford and Jane his wife, Stephen Rowan Crawford, John Bute Crawford, and Agnes Crawford, Plaintiffs; and Thomas Wilson (since deceased), Samuel Marryat (since deceased), Joseph Marryat the younger, Jane Tucker Crawford, James Crawford, and Joseph Tucker Crawford, the three last named Defendants being out of the jurisdiction of the Court, Defendants.

By Bill of Revivor,

Between the same, Plaintiffs; and Thomas Wilson (since deceased), Henry Chawner, Joseph Marryat the younger, and the said Jane Tucker Crawford, James Crawford, and Joseph Tucker Crawford, out of the jurisdiction of the Court, Defendants.

By Bill of Revivor and Supplement,

Between the same, Plaintiffs; and Ambrose Moore, Fletcher Wilson, Melvill Wilson, Joseph Marryat the younger, Henry Chawner, James Crawford, Jane Tucker Crawford, Joseph Tucker Crawford, and William Bennett, the three last named Defendants being out of the jurisdiction of the Court, Defendants.

The commercial correspondents of executors, acting under a power of attorney, held to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them, and applied by the direction of the executors in

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payment of a balance due from the latter, as partners in a commercial concern, to their correspondents with full knowledge, on the part of the correspondents, that the stock was part of the testator's assets.

There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust.

Where a *Scotch* sequestration had issued against a testator's heir, and it was necessary in a suit to have the testator's real representative before the court; the trustee under the sequestration, who was named as a defendant to the suit, and stated to be out of the jurisdiction, was held to be a sufficient representative of the testator's real estate.

December 17, 18, 1832. February 12, 1833.

THE original bill was filed by the younger children of the testator, John Crawford, who were pecuniary legatees under his will, which was made in the Scotch form, and by the husbands of such of them as, being daughters, were married, against the personal representatives of Joseph Marryat the elder, deceased, Joseph Marryat the younger, and the widow and three eldest sons of the testator, who were executrix and executors under his will, and who, being resident in Scotland, were alleged to be out of the jurisdiction of the court. The bill, which was revived, in the first instance, for the purpose of bringing the representative of Samuel Marryat, a deceased executor of Joseph Marryat the elder, before the court, prayed that the defendants, the representatives of Joseph Marryat the elder, and the defendant, Joseph Marryat the younger, might replace and make good to the estate of the testator, John Crawford, the two principal sums of 19,395*l.* Navy 5 per cent Annuities, and 14,000*l.* Irish 5 per cent Bank Annuities, and the sum of 2078*l.* 10*s.* 3*d.* cash, and that the same sums of stock and cash might be applied under the will of the testator in a due course of administration.

The testator, by his will dated the 19th of April, 1811, gave to his wife certain property absolutely, and the interest for life in all other his property real and personal, and after her death he directed his real or heritable property to be divided between his sons, in manner therein mentioned, and gave certain pecuniary legacies to the plaintiffs, his younger children, and made all his sons his residuary legatees, and appointed his wife Jane Tucker Crawford, and his sons James Crawford, Andrew Crawford (who died in 1825 intestate and insolvent), and Joseph Tucker Crawford, his executrix and executors.

The testator for some time carried on the business of a merchant at Port Glasgow and in Newfoundland, in partnership with his three sons, James, Andrew, and Joseph, under the firm of John Crawford and Co. On the 16th May, 1810, the testator retired from the partnership, and the business was subsequently carried on by his three sons under the same firm; but the public notice of dissolution, required by the Scotch law, was not given.

The testator died on the 3d of August, 1813.

Joseph Marryat the elder, who was in partnership with his son Joseph Marryat the younger (the latter of whom had little or no personal knowledge of the transactions which formed the subject of this suit), had for some years previously to 1813 been the correspondent and agent in London of the firm of John Crawford and Co. He had, also, during the same

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period been the agent of the testator in his separate capacity, and had in that character, by virtue of a power of attorney, been in the habit of receiving the dividends on the two sums of stock mentioned in the prayer of the bill, which were the separate property of the testator; and in respect of such dividends the firm of Marryat and son kept a separate account with the testator, and the sum of cash mentioned in the prayer was alleged to be the balance of such separate account.

On the 22d of October, 1813, James Crawford, the eldest son of the testator, remitted to Joseph Marryat the elder, the testator's will, with a request that he would give the necessary instructions for proving it in the Court of the Bishop of London. Mr. Marryat accordingly took the necessary steps for procuring probate of the will, which was granted, on the 11th of November, 1813, to James Crawford, Andrew Crawford, and Jane Tucker Crawford, the widow. Joseph, who was at that time abroad, did not prove the will.

On the 7th of January, 1814, James Crawford remitted to Joseph Marryat the elder two powers of attorney, dated on that day, executed by the widow, and the two sons, James and Andrew, which authorized Joseph Marryat the elder, not only to receive the dividends, but to sell the sums of stock before mentioned; but in the letter of James Crawford, which inclosed the powers of attorney, it was stated that they were sent to Mr. Marryat, to enable him to receive the dividends, which he was requested to place to the credit of the testator's estate with Joseph Marryat and Son.

On the 19th of January, 1814, a meeting of all the members of the family of John Crawford, the testator, interested under his will, took place in pursuance of certain directions contained in the will; at which meeting a minute was signed by all the parties present, whereby it appeared that the real property of the testator amounted to 50,712*l.*, and the personal property to 40,092.; and it was agreed that James Crawford should take the management of the testator's estate, as acting executor.

Messrs. Marryat and Son continued, after the death of the testator, to be the correspondents of the sons, trading under the firm of John Crawford and Co., and from time to time accepted bills drawn on them in the name of that firm, to be provided for by remittances in the usual course of commercial agency.

On the 21st of March, 1814, Messrs. Marryat received a letter, signed by the firm of John Crawford and Co., who had extended their commercial speculations by the establishment of a house at Lisbon, stating that, from the conduct of the Regency of Portugal, they had been deprived of funds, which they expected from thence, and requesting that they might be permitted to draw upon Messrs. Marryat at three months for 5000*l.* or 6000*l.*; and this permission was given by Messrs. Marryat.

On the 4th of May, 1814, Messrs. Marryat sent their account to John Crawford and Co.; by which it appeared that the balance then due to them, taking credit for their acceptances, was 3188*l.* 9*s.*

About this time, the firm of John Crawford and Co. applied to Messrs. Marryat, to give a credit to their Lisbon house; and Messrs. Marryat having complied with that request, John Crawford and Co. expressed their obligations for that accommodation by a letter to Messrs. Marryat, dated the 14th of May, 1814.

On the 17th of May, 1814, John Crawford and Co. wrote a letter to Messrs. Marryat, giving notice that they had drawn two bills for 2000*l.*

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each on Messrs. Marryat, and requesting them to sell 10,000*l.* stock in the Irish or Navy Annuities, as they should think best, and to hold the proceeds at their disposal.

On the 21st of May, 1814, Messrs. Marryat wrote to John Crawford and Co., stating that they would watch the stock market, and would sell the 10,000*l.* at the first favourable opportunity; adding, "with respect to the proceeds, the more regular way would be to credit your father's estate, in the first instance, and afterwards, to transfer to your account, on your forwarding to us an order from the executors to do so." Messrs. Marryat accordingly sold the sum of 10,000*l.* Navy 5 per cent Annuities for a sum of 9711*l.* 6*s.*, and, on the 28th of May, 1814, James Crawford wrote a letter to Messrs. Marryat, signed by him as acting executor for his father, requesting them to transfer the 9711*l.* 6*s.* to the account of John Crawford and Co.

Between this time and the 23d of November, 1814, John Crawford and Co. continued to draw largely on Messrs. Marryat on the credit of their account; and, on the 23d of November, 1814, John Crawford and Co. wrote a letter to Messrs. Marryat, advising them of further drafts to the amount of 5000*l.*, and adding as follows:—"our James Crawford expressed, when in London, and we take occasion to repeat, that it is not our wish that you should be brought into advance on our account; and therefore trust that you will not be delicate in selling so much stock as will replace those sums as soon as you require them, on the most favourable terms current." On the 29th of November, 1814, Messrs. Marryat answered the last-mentioned letter, engaging to honour the bills therein referred to, and adding, "we notice your directions respecting the sale of stock, which confirm those verbally given us by your Mr. James Crawford when in London; which we shall act upon whenever a favourable opportunity offers: but the price has been hitherto such as not to induce us to sell from choice; and we see no probability of our having occasion to sell from any other motives. We think we shall best consult your interests in letting it stand for the present." On the 11th of February, 1815, John Crawford and Co. wrote to Messrs. Marryat, stating that it was probable they should have occasion for a large sum in the next month, and requesting to know whether they could accept their bills to the extent of 15,000*l.*, at two or three months, adding, "we shall study to relieve you, either from our own funds, which may come round, or by sale of stock to suit your convenience."

On the 15th of February, 1815, Messrs. Marryat wrote to John Crawford and Co., noticing their application as to the 15,000*l.*, and engaging to honour their drafts, "being well assured that due provision would be made for them."

In consequence of this permission, John Crawford and Co. drew bills on Messrs. Marryat, exceeding the sum of 15,000*l.*; and, on the 21st of April, 1815, Messrs. Marryat wrote to John Crawford and Co. in the following words:—"Our engagements for your house considerably exceed the limitations we gave; but we have entered into them with confidence, not doubting your punctual reimbursement." On the 25th of April, 1815, John Crawford and Co. wrote to Messrs. Marryat as follows:—"We have been particularly accommodated by the engagements you have come under for us; which will be punctually reimbursed, either by remittances from hence, should funds come into our hands, or by the sale of

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stock, although, in the present depressed state of the public securities, that would be attended with considerable sacrifice."

On the 6th of May, 1815, Messrs. Marryat inclosed to John Crawford and Co. their account up to the 30th ultimo, making a balance in their favour of 17,892*l.* 16*s.*, after giving credit for the 9711*l.* 6*s.*; and also the account of Messrs. Marryat with the father's estate, making a balance due from them of 1552*l.* 2*s.* 6*d.*, which account they requested might be delivered over to James Crawford, asking the instructions of the executors as to the disposal of this balance.

In this last-mentioned account, Messrs. Marryat gave a credit to the father's estate for the 9711*l.* 6*s.*, and for the dividends on stock which they had received, and debited the testator's estate with the same sum of 9711*l.* 6*s.*, as transferred by them to John Crawford and Co.

On the 15th of May, 1815, Messrs. Marryat wrote as follows to John Crawford and Co.:—"Referring to our letters of this date to your Mr. James Crawford, on the subject of the sale of stock, we sincerely regret the unfavourable circumstances under which it is necessary to dispose of it; at the same time we must observe, that the engagements which we have come under for you were made relying on funds being in hand in time to provide for your drafts, and that we have made our own arrangements accordingly, or we should have been happy to have given further accommodation as to our reimbursements.—P. S. If your Mr. James Crawford thinks the war on the Continent likely to be terminated in a few months, I will postpone the sale of the stock, as far as can be done, in hopes of a better price for it."

On the same day, Messrs. Marryat wrote a letter to James Crawford, as follows:—"We have your favour of the 10th instant, desiring us to transfer the balance of our account with your late father's estate to the credit of John Crawford and Co. (which has been done accordingly), and directing us to effect a sale of the whole funded property, and credit the same account with the proceeds. The Stock Exchange is shut to-day, being Whitsunday; nor can any transfer be made at the bank before Thursday: we propose, therefore, to defer till that day giving our directions to our broker, and shall be very happy if any favourable circumstances, in the interim, should have an advantageous impression on the price. The last quoted price of Irish 5 per cents was 85, on this day week. Navy 5 per cents were, last Saturday, 86⅛ and 86⅜.—See my postscript to our letter of this date to James Crawford and Co."

On the 19th of May, 1815, John Crawford and Co. wrote to Messrs. Marryat, as follows:—"We have received your esteemed favour of the 15th instant, also covering one of the same date to our James Crawford. The favourable circumstances alluded to in our letter, respecting state of stock, was the reported disaffection of the French people to the French government, and which might enable the allies to make an easy conquest, and produce an immediate and favourable effect on the funds. We should be very sorry, however, that our drafts interfered with your own arrangements, and beg you may not delay the sale of the stock. When we drew upon you, we had confident expectations that funds from our own business would have come round to meet these bills. In this, however, we were disappointed, and were obliged to have recourse to this way of reimbursement. We took occasion to hint to you that our demands might require your further assistance, to the extent of 8000*l.* or 10,000*l.*

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The salvage, repairs, and outfit of our two vessels at Bermuda falling due, at the end of the present week, in a bill of 5000*l.*, and some other payments to make, and our remittances at this early season being still very slender, have taken the liberty to pass our drafts on you through our bankers, at three, four, and five months, for 10,000*l.*, as noted at foot, to which we crave your acceptance, and may rely on our punctual attention to fill your hands in sufficient time with remittances."

On the 23d of May, 1815, Messrs. Marryat wrote to John Crawford and Co., promising to accept their further drafts for 10,000*l.*, but complaining of their drawing so largely without previous advice.

On the 19th of July, 1815, Messrs. Marryat wrote to John Crawford and Co. as follows:—"Since our last of the 3d inst., we have none of your favours to acknowledge. We now advise you that our broker has at length succeeded in selling 5000*l.* of the Irish 5 per cents at 85¼, which have been this day transferred; and you are credited, after deducting brokerage and transfer, 4256*l.* 2*s.* 6*d.* On the 6th inst. we also credited you for proceeds of 9395*l.* Navy 5 per cents at 86¼, less brokerage, 8091*l.* 8*s.* 9*d.* On the 8th inst., for a half year's dividend thereon, 211*l.* 7*s.* 9*d.* We will thank you to procure and forward us a letter from the late Mr. Crawford's executors, confirming the above, as well as our having credited you the dividends on Irish 5 per cents, as advised in ours of 28th ult., 315*l.* We shall advise you as to any further sales of the Irish stock when effected; but there is no description of funded property which is so difficult to realize, from the want of a regular market."

On the 20th of July, 1815, Messrs. Marryat wrote to John Crawford and Co. as follows:—"We have to inform you that 5000*l.* more of the Irish 5 per cents have been sold at 85¼; in our next we hope to advise the sale of the remaining 4000*l.*"

On the 21st of July, 1815, Messrs. Marryat wrote to John Crawford and Co. as follows:—"The remaining 4000*l.* Irish 5 per cents are sold at 85¼, which will produce, less brokerage, 3415*l.* The 5000*l.* advised yesterday produced 4256*l.* 2*s.* 6*d.*; and you will oblige us by sending a letter from the executors confirming the transfer of these sums to your account."

On the 15th of August, 1815, Messrs. Marryat wrote to John Crawford and Co. a letter which contained the following postscript:—"Since closing our letter, we have, in consequence of Mr. Forster's advising a bill for 1000*l.*, referred to the three accounts, and find this will make us in advance about 11,000*l.*; but this must be considered as the limit, and we request there may be an understanding to this effect between you and your establishment at Portugal; for, particularly at this moment, we, like all other merchants, wish that the amount of our acceptances should be as confined as possible."

On the 29th of August, 1815, James Crawford wrote to Joseph Marryat the elder the following letter:—"On my return here yesterday, I found your very esteemed letters up to the 15th instant; their contents have been duly observed, and all the entries are made in conformity. I am concerned our accounts should have occasioned the writing the postscript to the last letter. I am now directing our friends in Portugal to use every exertion to replace their drafts. The Lisbon firm wrote they have remitted for the bill returned under protest for 750*l.*, and have no doubt you shall soon have other considerable remittances. They have prospects of very handsome consignments of fish now on the way, and

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may require to draw for something to account on arrival. These, I hope, it may not be inconvenient for you to accept; meanwhile I have requested payment of some moneys lent out in this quarter on heritable security, and, as soon as I can touch, will send it to you, with whatever other sums from abroad come into my hands. I think it necessary, however, to explain to you, who have been so liberal with us, that our house is possessed of real property, unincumbered with debt, to the amount of 90,000*l.*; that we have discontinued any business for our own account, keeping merely the shipping, which are at this season loading on consignments."

The commercial connection between Messrs. Marryat and John Crawford and Co. continued until the latter became bankrupts, in February, 1826; when the debt due from them to Messrs. Marryat amounted to upwards of 20,000*l.*, after giving them credit for the produce of the stock. A sequestration, in the Scotch form, issued against them, and William Bennett was duly appointed trustee under the sequestration, and in that character acquired the legal interest in the testator's real estates; which, by a decree of the Court of Session in Scotland, affirmed upon appeal by the House of Lords, were adjudged to be sold by Bennett, and were declared to be in the first place applicable to the payment of the unsatisfied debts of the testator, which were stated to exceed the value of the estates.

The widow of the testator proved under the sequestration, as a creditor of John Crawford and Co., for the amount of the stock sold, and received a dividend of 3*s.* 4*d.* in the pound.

The cause first came on to be heard before the Master of the Rolls, on the 17th of March, 1829; when an objection was taken that the widow of the testator, who was his sole solvent representative, was not actually before the court, but merely named as a defendant, and stated to be out of the jurisdiction. The Master of the Rolls being of opinion that, if the claim of the plaintiffs succeeded the amount recovered by them must be applied in a due course of administration, and that the executrix was therefore to be considered as an active, and not as a passive party, allowed the cause to stand over, with liberty to amend by adding parties.

A bill of revivor and supplement was afterwards filed, the revivor becoming necessary upon the death of Thomas Wilson, the surviving executor of Joseph Marryat the elder, in order to bring the representatives of the former before the court. The supplemental part of this bill stated the proceedings in Scotland under the sequestration, and in relation to the administration of the assets of the testator John Crawford, and the proceedings in the House of Lords upon the appeal from the decision of the Court of Session. It charged that Jane Tucker Crawford and Joseph Tucker Crawford were still out of the jurisdiction of the court, and that Jane Tucker Crawford was in collusion with the defendants, and refused to institute proceedings against them for the purpose of compelling the replacement of the sums of stock in question. William Bennett, the trustee under the sequestration, was named as a defendant, and stated to be out of the jurisdiction of the court.

To this bill James Crawford appeared, and Jane Tucker Crawford appeared, and put in an answer, whereby she denied collusion, but admitted that she had not instituted any proceedings against the defendants for the purpose of compelling the re-investment of the sums of stock in question, though she had been requested to do so.

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Mr. Pemberton and Mr. Stuart for the plaintiffs:

The estate of Marryat and Son is clearly answerable for the value of the stock sold out by that firm without due authority, and with the full knowledge that the stock was the property of the testator. The general principle upon which this liability rests is, that a person who deals with an executor in respect of property which he knows to be part of the assets of the testator, and which he receives with notice, direct or implied, that such property is applied to the private purposes of the executor, cannot hold money so possessed against creditors or general legatees under the will. Hill *v.* Simpson, 7 Ves. 152, establishes this principle in favour of general legatees. In M'Leod *v.* Drummond, 14 Ves. 353; 17 Ves. 152, Sir William Grant would not extend the principle to the case of an executor claiming to follow assets pledged by his co-executors in the hands of a banker; but that decision has never been deemed satisfactory, although it was affirmed upon appeal on the ground of certain special circumstances in the case; and the language of Lord Eldon, in his judgment upon that appeal, is certainly strong to show his opinion in respect of the general right of all legatees, whether pecuniary, specific, or residuary, to follow the assets of the testator, where they have been misapplied by the executor, 17 Ves. 169. "The case of a residuary legatee," says his lordship, "is stronger than that of a pecuniary legatee. If it is wrong, as against a creditor, for the executor to apply the fund in payment of his own debt, why is it not equally wrong, both in law and equity, to allow a third person wilfully and fraudulently to take from the executor that money, which in his hands the residuary legatee can call for, as the specific property of the testator?" In Keane *v.* Robarts, 4 Mad. 333, this principle is established upon grounds which are directly applicable to the circumstances of this case, and which leave no doubt as to the liability of the defendants.

In Watkins *v.* Cheek, 2 S. & S. 205, it is laid down that, if the nature of the transaction affords intrinsic evidence that an executor, in a mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, the mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trust, but equally subject to the payment of debts and legacies as it would have been in the hands of the executors. Here, there is not only intrinsic evidence, from the nature of the transaction, that the executor was committing a breach of trust, when he diverted the application of the trust fund to the payment of his own debts, but that intrinsic evidence is confirmed by the correspondence which fixes Mr. Marryat the elder with the knowledge of the misapplication of the fund, and consequently renders him a party to the breach of trust.

Mr. Bickersteth for the representatives of the surviving executor of Joseph Marryat the elder:

The objection for want of parties, which applied to the original bill, is equally applicable to the suit in its present form, for there is no party before the court representing the real estate of the testator; and if ever there was a suit in which a defendant was justified in resorting to every legal means of protection, he has a right to do so in a case where the plaintiffs are seeking to indemnify themselves for a loss occasioned by their own brother, at the expense of the estate of Mr. Marryat, who, throughout these transactions, acted with the most perfect good faith and

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liberality. This is a suit instituted by legatees against persons alleged by them to be debtors to the estate of John Crawford, without bringing before the court the persons who are to administer that estate. Bennett is the representative of the testator's real estate; he is therefore an indispensable party to the suit, and being out of the jurisdiction of the court, he is not, for the purposes of this suit, a party. The court has, in the first place, no means of satisfying itself that the plaintiffs have any interest; and supposing them to have a claim, the suit is so framed, that it is impossible for the court to make a decree against the parties who are primarily liable. No relief is prayed against Jane Tucker Crawford: she is alleged, indeed, in the bill to have colluded with Marryat, and refused to sue; and by her answer she denies that she colluded, but admits that she refused to sue. If any breach of trust has been committed, she is the party who authorized it by executing the power of attorney: she is the party primarily liable; yet no relief is prayed, nor can any decree be made against her.

The Master of the Rolls:—I must undoubtedly be satisfied that all the necessary parties for administering the testator's estate are before the court; for I cannot assume that these plaintiffs have an interest. If they have been satisfied *aliunde*, they have no interest; and they can only show that they have not been satisfied by bringing before the court the parties who have the legal right to administer, and are capable of showing the state of, the testator's property. I will consider the objection which has been taken to the frame of the suit.

On the following day his Honour delivered his opinion upon this point to the following effect:—

A question has been made, whether this suit is so framed in respect of the parties brought before the court, that the court can proceed to consider the questions raised by the bill; and I am of opinion that the suit is well framed for that purpose. The bill is filed by legatees under the will of the testator, John Crawford, against persons alleged to be debtors to the estate of the testator. Mrs. Crawford, the personal representative of the testator, refuses to concur in this suit; and, where the personal representative of a testator refuses to sue, any person beneficially interested in the assets has a right to institute a suit in respect of such assets. The defendants being alleged to be debtors to the testator's estate, the claims of the plaintiffs upon the assets, if established, must be satisfied in a due course of administration; the question is, therefore, whether there are before the court the necessary parties for the due administration of the testator's estate. I have read the proceedings in the Scotch suit; and it appears to me that Bennett, who is made a defendant, is now the person in whom the real estate is vested. There is, consequently, the proper person before the court in respect of the administration of that part of the estate. With respect to the personal estate, there are the executor, one of the sons who who has become bankrupt, and the widow, the executrix, who is not a bankrupt, but who proved against the son's estate under the sequestration. All the proper parties, therefore, are before the court. It has been said that no decree can be made, in this suit, against the representatives of Mr. Marryat, since the party primarily liable is a defendant, against whom no relief is prayed; but it is a misapprehension to suppose that any persons concerned in a breach of trust are primarily liable. All parties to a breach of trust are equally liable, and if the court

should be of opinion that the widow has been guilty of a breach of trust,—though there is nothing, so far as the case has proceeded, to induce the court to come to that conclusion—the decree would be as much against her as against the representatives of Mr. Marryat; but the plaintiffs have a right to proceed against such of them as they think fit. The court must therefore proceed to the consideration of the questions raised by this bill.

The argument was accordingly continued.

Mr. Bickersteth, Mr. Tinney, Mr. Burge, Mr. Wray, and Mr. Jacob, for the several defendants, relied upon such parts of the correspondence between the two firms as went to show that Mr. Marryat the elder had no knowledge of the dissolution of the partnership between the testator and his sons. The transfer of the stock was not made to relieve Crawford and Co. from any debt previously due to Messrs. Marryat; how, therefore, could the latter know that the money was not to be applied in relief of liabilities incurred by the testator? In Hill *v.* Simpson, 7 Ves. 152, and the other cases which had been cited, the assets were applied in satisfaction of antecedent debts of the executor, so that the possibility of their having been applied for the benefit of the testator was necessarily excluded. There was another circumstance materially distinguishing this case from Hill *v.* Simpson. In that case, the shortness of the time, within which the transfer was made after the testator's death, was much relied upon; here large remittances were for some time made by Crawford and Co. to Messrs. Marryat, and there was nothing in the state of the dealings between the two firms to excite suspicion. It was assumed that Mr. Marryat the elder must necessarily have been cognisant of the contents of the will, because, as agent for the house of Crawford and Co., he had taken the necessary steps for procuring probate of it. That conclusion by no means followed; but, supposing him to have read the will, would that circumstance prove that he was a party to the misapplication of the testator's assets? So far from it, he would have learned from reading the will that James Crawford and his co-partners were themselves legatees to a larger amount than the whole value of the stock in question. Now, in Keane *v.* Robarts, the executors took nothing under the will. It would be extending the principle, therefore, upon which persons dealing with executors were held liable, if it were applied to this case; and, considering the length to which the cases had already gone, it would be utterly impossible, if that principle were carried further, for any merchant, with due regard to his own security, to have dealings with another, who happened at the same time to be an executor. If, as had been intimated by the court, no breach of trust had been committed by the executrix, who authorized the sale of the stock by executing the power, and who adopted the transaction by claiming the amount of the produce of the sale against the estate of the bankrupt, neither could any breach of trust have been committed by Mr. Marryat, who bore the same relation to the executrix, which an agent bears to his principal. Lastly, it was contended that the claim was barred by the statute of limitations, on which the defendants had insisted in their answers.

Mr. Lovat for Jane Tucker Crawford.

Mr. Pemberton, in reply, said it was clear that Mr. Marryat applied the assets of the testator in the belief that he acted without any legal authority; for the power executed by the widow did not authorize him to dispose of the stock without the consent of both executors; and the

[Wilson *v.* Moore.—1 Mylne & Keene, 126.]

direction to sell was given by only one of them. It was not disputed that he never obtained that sanction for what he had done, which he himself knew, and even suggested, to be necessary. But, supposing the power to have conferred a legal authority, he had no equitable right to sell the stock, knowing that the produce of the sale was to be applied in satisfaction of a demand which was not a demand upon the assets of the testator. It was sufficient to fix him with the knowledge that the assets of the testator were to be applied to a purpose inconsistent with the trusts of the will, even if he had himself reaped no benefit from the sale; and that knowledge was clearly proved by the correspondence between him and Mr. James Crawford. As to the interest of the sons under the will of the testator, the knowledge of which was supposed to have been sufficient to remove from the mind of Mr. Marryat all suspicion as to the proper application of the produce of the stock, it was to be borne in mind that the sons were not entitled to any portion of the property until after the death of the tenant for life. With respect to the statute of limitations, it was a little singular that those who contended that the widow had committed a breach of trust should set up this defence against the claim of the *cestuis que trusts*, who were brought here as plaintiffs in consequence of the refusal of the widow to sue. The representatives of Mr. Marryat claimed under the widow, and must stand in her situation. It was true that in cases of constructive trust the court had adopted a period of twenty years as the limit beyond which it would not grant relief; but no time could be a bar to the claim against the executrix. Moreover the legal right of the plaintiffs did not attach during the life of the widow, and the plaintiffs now came into court upon that principle of equity which enabled parties to obtain the aid of the court before their rights actually accrued.

February 12, 1833.—The Master of the Rolls:—The statute of limitations has no application to this case. If Messrs. Marryat are chargeable, it is because, in the consideration of a court of equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will; and it is further to be observed that, if this were a legal demand, the statute of limitations could not avail the defendants, because the title of the plaintiffs will not accrue in possession until the death of the widow, and their claim is, not for payment, but for security of the fund. All parties to a breach of trust are equally liable; there is between them no primary liability; and if the widow were a party to the breach of trust, that circumstance will not in any manner protect the defendants from the plaintiffs' demand. The plaintiffs make no charge against the widow; and, as far as appears in this cause, there seems no ground for any charge against her. The sale of the stock might well be required for the payment of the testator's debts; it was a reasonable, not an improvident act, therefore, on the part of the widow, to authorize a sale; and it was clearly her duty to prove the amount of the stock under the sequestration, even if she considered that Messrs. Marryat were liable.

The correspondence between the testator and Messrs. Marryat, referred to as establishing their ignorance of the dissolution of the partnership between the testator and his sons, does not appear to me to warrant that inference; but the fact is not material. Messrs. Marryat well knew that the stock in question belonged to the estate of the testator; and they were parties to the application of the produce of the stock to relieve the embar-

rassments of the sons, in payment of a debt due from the sons to themselves, without even a representation from the sons that they had acquired a personal title to the stock, and without the least reason to believe that it was acquired directly or indirectly for the purposes of the testator's will.

The circumstance of Messrs. Marryat having had the testator's will remitted to them, and of their having been the agents in obtaining the probate of the will, makes this case stronger than any similar case which has been reported; but without regard to that circumstance, it would be my duty to declare that for the amount of the stock sold, and the cash balance transferred from the credit of the testator's estate to the credit of John Crawford and Co., the defendant Joseph Marryat, and the estate of his father, are responsible; and the accounts must be taken accordingly.

The sum resulting from the account so taken will be assets of the testator, to be applied in a due course of administration; and for that purpose an account of the testator's debts and personal estate must be taken, and an inquiry must be directed as to the produce of the real estate sold by the defendant Bennett, the trustee under the sequestration, and of the application of that produce.

Messrs. Marryat will be entitled to credit for the dividend paid to the widow on the proof made by her under the sequestration; and they will take such measures as they may be advised with respect to the widow, and as to the interests of the sons composing the firm of John Crawford and Co., under the testator's will; and they must pay to the plaintiffs, and to the widow, the costs of this suit.

Townley *v.* Bolton.

1 *Mylne & Keene*, 148.

A testatrix gave 50*l.* long annuities to her sister M. T., and her said sister's husband, for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities.

November 10, 1832.

THE will of Mary Benfield, dated the 12th of August, 1811, contained the following bequest:—"I give to my sister Martha Townley, and her husband George Stepney Townley, 50*l.* per annum long annuities for their joint lives, and after their decease to go to my own nephew Charles Phipps." And the testatrix gave all the residue of her estate to her sister Arabella Sprigg, whom she appointed the executrix of her will.

The testatrix died shortly after the date of her will, leaving Martha Townley and Charles Phipps surviving her, and the will was duly proved by Arabella Sprigg. Charles Phipps died in 1818, and Martha Townley died in 1824. The bill was filed by the committee of George Stepney Townley, who was a lunatic, against the respective personal representatives of Charles Phipps and of the residuary legatee; the suit being instituted in pursuance of a report made by the Master, upon an inquiry directed by the Lord Chancellor, that it would be for the benefit of the lunatic to ascertain his rights under the will.

[In the Matter of Brand.—1 Mylne & Keene, 150.]

Mr. Bickersteth and Mr. Whitmarsh, for the plaintiff:

The question is, whether, under the words of this bequest "during their joint lives," the husband of Martha Townley became entitled to a life interest in the legacy, upon her decease, by survivorship, or whether the gift over is to take effect on the death of one of them. The plain import of the words is, that Martha Townley and her husband shall take as joint tenants; and if a different construction were to prevail, no benefit whatever would be given to the husband in his own right, and the addition of his name would be nugatory. The words "after their decease" put the meaning of the testatrix beyond doubt; for unless these words can be taken to be equivalent to "after the decease of one of them," it is impossible that the testatrix could have intended to exclude the husband from the benefit of survivorship.

Mr. Roupell for the representatives of Charles Phipps.

Mr. Jacob for the executors of the residuary legatee.

The Master of the Rolls:—The gift over being after the decease of both husband and wife, it is plain that the testatrix intended that the survivor of the husband and wife should be entitled to the long annuities.

In the Matter of Brand.

1 *Mylne & Keene*, 150.

Where a lunatic, who had no issue, was seised of an estate tail in possession, with the immediate reversion to himself in fee, and the land had been sold under the 1 W. 4. c. 65, for payment of his debts, an order was made on the committee to suffer a recovery on behalf of the lunatic, in order to complete the title to a purchaser. November 20; December 12, 1832.

UNDER the will of his grandfather, the lunatic was entitled in possession, as tenant in tail general, to the copyhold portion of an estate, consisting both of freehold and copyhold lands, situate at Sutton in the county of Suffolk; and the immediate reversion in fee was also vested in the lunatic, by the effect of the same will. He had acquired the fee-simple of the freehold portion of the property, by a recovery suffered previously to his lunacy. The copyholds consisted of about thirty acres, and the freeholds of upwards of five hundred acres; but, from the manner in which they lay intermixed, it was impossible to distinguish the freeholds from the copyholds; and the whole estate had been sold for the purpose of paying the lunatic's debts, under an order of the court, without adverting to the fact of the subsisting entail of the copyhold. The property was purchased by the trustees under Mr. Thellusson's will, by whom an objection was taken to the title upon that ground.

A petition was thereupon presented by the committee, under the 1 W. 4. c. 65. The petition, after setting forth the facts above mentioned, and stating that the lunatic was married, but had no issue, prayed that the

[In the Matter of Brand.—1 Mylne & Keene, 150.]

petitioner might be at liberty to suffer a recovery of the copyhold lands in the Lord's Court in the name of the lunatic.

Sir E. Sugden and Mr. Wood, in support of the petition, submitted that the proposed recovery was merely a mode of conveyance, which, under the powers given by the twenty-eighth section of the statute, the Lord Chancellor had authority to direct; and which, as the second section expressly declared, was to include all acts necessary to be done in order to give the assurance full force and validity. Upon the statute of Anne, 7 Ann. c. 19, relating to infant trustees, it had been decided that an infant might well execute a conveyance by fine or recovery; *Ex parte* Maire, 3 Atk. 479; *Ex parte* Johnson, 3 Atk. 559; *Ex parte* Smith, Amb. 624. And why might not the act necessary to bar the entail, and give effect to the order of the court, be done by the committee as well as by a child incapable of consenting? If, as was the case in many manors, the entail could be cut off by a surrender, the committee would be the person, who would be directed to make the conveyance, and to go through the form of surrendering in the Lord's Court. It was material to observe, besides, that this lunatic had the immediate reversion in fee in himself, so that there was no difficulty as to the rights of ulterior remainder-men. From the analogy of the provisions of the Bankrupt Act in respect of the interest of a bankrupt tenant in tail, it might be inferred that the estate of a lunatic tenant in tail, in a case like the present, was, in equity, to be regarded as tantamount to an absolute interest in the property.

Mr. Ellison, for the purchasers, submitted to act as the court should direct.

December 12.—The Lord Chancellor:—In this case, the lunatic is tenant in tail of the property in question, with the immediate reversion in himself in fee. If there had been any intermediate remainders, the estate would not have been such as comes within the description of "land of or to which any person being lunatic shall be seised, or possessed, or entitled;" and I should have held, without any doubt, that the act only gives the power of selling or charging the lunatic's own interest, and not of doing any thing which would defeat the estates of others, although the lunatic, if of sound mind, might have defeated those estates. It is plain enough, upon the reason of the thing, that we must impose this restriction upon the very great generality of the expressions employed in the twenty-eighth section, and interpreted by the second. But the twenty-ninth section, respecting the application of the surplus, leaves it still more clear; for none of the terms used to describe the persons whose interests in the surplus are saved by that section, are at all applicable to remainder men.

The difficulty with which I am pressed, therefore, is reduced to one of a merely technical nature—how the committee can be made tenant to the *præcipe* in order to suffer a recovery, or (which it is, perhaps, easier to do under the provisions of the act, and supposing the recovery to be with a double voucher) how he can be directed to convey an estate of freehold, for the purpose of making a tenant to the *præcipe*, and then being himself vouched; and how his recovering compensation in value can operate as a bar; for the compensation, though merely imaginary, is nevertheless the foundation of the bar. But a like difficulty existed in the case of infant trustees, under the 7 Ann. c. 19. The substance, no doubt, is very differ-

ent in that case; for the infant is merely a channel of conveyance, and would be no more were he of full age. But that is not the question. The form, which gives rise to my principal doubt, is the same; and Lord Hardwicke seems to have felt it in *Ex parte* Johnson, 3 Atk. 559, and still more in *Ex parte* Bowes, 3 Atk. 164; yet, upon the words of the act, which are not stronger than this, he made an order that the infant should convey by a common recovery.

I am unwilling, especially where the amount of the property of which the lunatic is tenant in tail is so inconsiderable, to send the parties to parliament, if the act can reasonably be held to give the court this power; and I will, therefore, make the order as prayed.

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1 *Mylne & Keene*, 154.

On an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matters in *statu quo*, and will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined.

Effect of laches in depriving a party of his remedy by injunction.

Construction of the Glamorganshire canal acts.

Principles applicable to the construction of acts of parliament establishing public companies with extraordinary powers for the execution of works of local or general utility.

December, 1825. November 13, 14, 15, 16. 19; December 20, 1832.

BY 30 G. 3. c. 82., intituled "An Act for making and maintaining a navigable Canal from Merthyr Tidvill to and through a place called The Bank, near the town of Cardiff in the county of Glamorgan," it was by the first section enacted, that the several persons therein named should be a body politic and corporate, by the name of the "Company of Proprietors of the Glamorganshire Canal Navigation," and the said company were thereby authorized and empowered to make and complete a canal from Merthyr Tidvill, through the several parishes therein mentioned, to and through a place called The Bank, near to the town of Cardiff.

By the fifth section of that statute it was enacted, that such part of the said canal as should be made through the lands of Messrs. Harford, Partridge and Co. at Melin Griffith, should be made as near to the hill adjoining to such lands as conveniently might be, and should not be of any greater width than twelve feet in the respective places thereinafter mentioned; and that such part of the said canal as should be made through the lands of the said Harford and Co. should be sufficiently walled from the bridge to the house therein mentioned, and should be fenced from the lands of the said Harford and Co. on the west side of the said canal by a substantial wall or paling five feet high at the least; and the same, and also the towing path to be made on the side thereof, should be kept in all parts separate from the cut or water-course by means whereof the said Melin Griffith works were supplied with water, and from the towing

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path belonging to such cut or water-course, unless the proprietors of the said works for the time being should, by writing under their hands, upon the application of the said company of proprietors, consent that the same should be united.

By the sixth section it was enacted, that a proper weir should be made upon the side of the said canal, above the said Melin Griffith works, within the lands of the said Harford and Co., for the purpose of letting off or conveying the surplus water, or such as should not be necessary for the use of the said canal, into the cut or water-course belonging to the said Melin Griffith works; and for better securing such surplus for the use of the said Melin Griffith works, the lock which should be made upon the said canal, below and nearest to the said works, should always be kept in good and sufficient repair and condition by the said company of proprietors, for the purpose of preventing leakage or waste of water.

By the seventh section it was enacted, that a proper weir should be made upon the side of the said canal by the said company of proprietors, above the weir then already erected upon the river Taff, for conveying the water from the said river to the iron works called the Pentyrch works, in some place between the brook at Nantgarw turnpike and the said weir then already erected for securing the surplus water, or such as should not be necessary for the use of the said canal, for the benefit of the Pentyrch works aforesaid, which weir should be kept in constant and sufficient repair at the expense of the said company of proprietors; and for better securing such surplus water for the benefit of the said Pentyrch works, the lock which should be made upon the said canal, below and nearest to the said weir then already erected as aforesaid, should always be maintained in good and sufficient repair and condition by the said company of proprietors, for the purpose of preventing leakage or waste of water.

By the forty-sixth section it was enacted, that the clear profits to be received by the said company of proprietors from the said navigation, should never exceed the sum of 8*l.* per cent upon all such money as should be actually laid out and expended in making and completing the said navigation and the several works relating thereto, and in defraying the charges and expenses of obtaining the said act; and that when the profits of the said canal should exceed 8*l.* per cent, the tonnages should be reduced so as to make the profits as near that rate as possible.

By the fifty-third section it was enacted, that all persons should have free liberty to use, with horses, cattle, and carriages, the private roads and ways belonging to the said company of proprietors, except the towing paths, for the conveying goods and other things to or from the said canal, and any wharfs, quays, or landing places belonging thereto, without paying for the same; and also to navigate upon the said canal with any such ships, boats, or other vessels as the locks thereon would permit, and to use the said wharfs and quays for the loading and unloading any goods and other things, and to use the said towing paths for the haling and drawing such boats, upon payment of the rates therein before granted.

By the fifty-eighth and fifty-ninth sections it was enacted, that it should be lawful for the proprietor or proprietors of any mines of coal, iron-stone, limestone, or other minerals, or of any furnaces or other works, to make any navigable cut or cuts, in such manner as he, she, or they should think proper, through his, her, or their own lands or grounds, and also through the lands or grounds of any other person or persons, to com-

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municate with the said canal, so that the same be done without diverting any streams of water which were necessary for supplying the said canal, or which were or should be necessary for the working of any furnaces, forges, or mills, and without doing any injury or damage to the said navigation; and so as the person or persons making every such cut should, if thereunto required by the said company of proprietors, make, erect, and maintain a stop gate or stop gates on every such cut, in order to prevent the water being drained or wasted out of the said canal by means of making any such cut to communicate therewith as aforesaid; and every such cut should be public and open to all persons for the conveyance of any goods, wares, or other things, in boats or other vessels, upon payment to the person or persons at whose charge and expense such cut should be made, his, her, or their heirs, executors, administrators, or assigns, the like tonnage as should for the time being be payable to the said company of proprietors upon the said canal: provided always, that no such cut should be made by any persons through the lands of any other persons, unless with their consent.

By the sixtieth section it was enacted, that the lord of any manor, and the owner of any land, through which the said canal, or any such cut as aforesaid, should be made, might erect or use any wharfs, quays, landing places, cranes, weigh-beams, or warehouses, in or upon their respective lands, grounds, or wastes, adjoining or near to the said canal, or any such cut as aforesaid; and might land any goods or other things upon such wharfs, quays, or landing places, or upon the banks lying between the same and the said canal, or any such cut as aforesaid; and also might make and use proper and convenient places for boats and other vessels to lie in, turn, and pass by each other, so that the making or using thereof did not obstruct or prejudice the navigation of the said canal, or any such cut as aforesaid, or any towing path on the sides thereof; and all rates that should be paid for the use and benefit of the said wharfs, quays, landing places, cranes, and weigh-beams respectively, should be and the same were thereby vested in the lord of such manor, or the owner of such lands or grounds, as should make or erect the same as aforesaid.

By the sixty-first section it was provided, that if any such lord or owner should not, within the space of twelve calendar months after notice from the said company of proprietors that any part of such lands was necessary to be used by him for the purpose of erecting warehouses and buildings for the use of the said navigation, or for the other purposes therein mentioned, make such proper and sufficient warehouses, &c., it should be lawful for the said company of proprietors to make the same.

By the sixty-second section it was declared, that nothing therein contained should authorize or empower the said company of proprietors, or any other person or persons, to make use of any wharf, quay, landing place, crane, weigh-beam, or warehouse, which should be set out or made by the lord of any manor, or the owner of any lands or grounds adjoining or near to the said canal, or any such cut as aforesaid, for his own private use only, nor to set up, erect, repair, or use any cranes or weighing machines in or upon any such wharf, quay, or landing place; and that no more than the sums therein mentioned should be paid for the use of such wharf, &c.

By the seventy-ninth section it was enacted, that if any action, suit, or information should be brought or commenced against any person or persons for any thing done in pursuance of that act, the same should be

brought or commenced within six calendar months next after the fact committed, or in case there should be a continuation of damage, then within six calendar months next after the doing or committing such damage should cease, and not afterwards, and should be laid and brought in the county of Glamorgan, and not elsewhere; and the defendant or defendants in such action, suit, or information should and might plead the general issue, and give that act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance and by the authority of that act; and if it should appear to have been so done, or if any action, suit, or information should be brought after the time so limited for bringing the same, or should be brought in any other county or place than as aforesaid, then and in such case the jury should find for the defendant or defendants; or if the plaintiff or plaintiffs should become nonsuit, or suffer a discontinuance of his, her, or their action, suit, or information, after the defendant or defendants should have appeared, or if a verdict should pass against the plaintiff or plaintiffs, or if, upon demurrer or otherwise, judgment should be given against the plaintiff or plaintiffs, the defendant or defendants should have treble costs, and should have such remedy for the same as any defendant had for costs of suit in any other case by law. And by the last section it was enacted, that the act should be a public one.

In the thirty-sixth year of the reign of his majesty, king George III., the proprietors of the Glamorganshire canal obtained another act of parliament [36 G. 3. c. 69.], to amend and extend the former act, which it recited, and authorizing them to raise an additional sum of 10,000*l.*, and also, subject to certain conditions, another like sum of 10,000*l.*, for the purposes therein mentioned. By the third section of this act, it was enacted, that the several works therein mentioned, and the extension thereby authorized to be made, and all other works whatsoever incident to the canal and extension, to be made and done by virtue of the said recited act and that act, should, in all things, be finished and completed within the space of two years then next after the passing of that act; and no part of the sum thereby authorized to be raised should be applied in or towards defraying the expenses of doing or performing any of the works therein mentioned, which should not be done and made within the said space of two years.

Some years after the passing of these acts, Richard Blakemore became the purchaser of the Melin Griffith and Pentyrch works, in the first act mentioned; and the proprietors of the canal having made some alterations therein which Mr. Blakemore conceived would be prejudicial to his works, he, in the month of August, 1824, filed his original bill against the Canal Company. This bill, after setting forth the two acts of parliament already mentioned, stated that the canal was completed in the year 1801, prior to which time the aforesaid works of the plaintiff were (with the exception of what was derived from a small rivulet) wholly supplied with water from the river Taff; it then stated, that the Court of King's Bench had decided that the sixth section of the first-mentioned act was to be considered as being in the nature of a contract between the parties, and that the operation thereof must be taken as applicable to the trade of the canal when once at work, the quantity of water requisite for which was ascertainable by a gauge; it further stated, that the defendants had begun to widen and deepen the canal, whereby the traffic on the canal would be increased, and a greater quantity of water be required, and that,

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as such additional supply was to be taken from the river Taff, the supply to the plaintiff's works would be necessarily diminished. The bill, therefore, prayed that the canal company might be restrained from doing any act for the widening, deepening, or enlarging the canal, or whereby any larger consumption of the waters of the river Taff might be caused than was contemplated by the act, or whereby the supply of water to the plaintiff's works might be in anywise diminished; and also that the defendants might be restrained from laying out or expending, in such widening or deepening of the said canal, the surplus income arising from the rates thereof, beyond what might divide eight per cent on the capital authorized to be raised for the making of the said canal and the extension thereof.

A few days afterwards, Mr. Blakemore filed his supplemental bill against the company of proprietors, their then clerk, and several shareholders of the company, stating that certain works and operations were then in progress or contemplation under the authority of the company and the other defendants, and, in particular, certain operations for enlarging and deepening the basin of the canal at Cardiff; whereby, as the plaintiff alleged, an additional supply of water would be necessarily required for the use of the canal, to the plaintiff's prejudice; and praying that the defendants might be decreed to fill in the basin therein mentioned, and to restore it to the same state as it was in prior to the enlargement thereof; and that, in the meantime, the defendants might be restrained from filling the said basin with water, and using the same in its then present enlarged state and form, or permitting the same to be filled and used, or, if filled, from using or permitting the same to be used.

December 17. 23, 24. 29, 1824.—Upon the coming in of the answer, a motion was made before Lord Eldon to dissolve an injunction which had been obtained *ex parte* on the filing of the original bill. Lord Eldon, in delivering judgment upon that occasion, after stating very fully the material clauses of the acts of parliament, and the substance of the pleadings, commented at some length upon the mode in which the defendants had, by their answer, attempted to meet the allegations of the bill, with respect to the construction put upon the acts of parliament by the Court of King's Bench, and then continued to the following effect:—

It does not appear to me to be of importance to consider whether these iron works have, or not, any right to the water, founded upon usage prior to the making of this canal; because I follow and adopt the expression of the Lord Chief Justice of the King's Bench, and I am glad to fasten myself in some measure on his great authority, and say that, when I look upon these acts of parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else:—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with refer-

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ence to the interests of the public, as with reference to the interests of individuals.

It is upon this ground that applications are frequently made to stay operations, where a canal is in the progress of formation. In such a case, it may be of very little consequence to A. B. whether the canal is brought to his lands through the lands of C. D., or through those of E. F.; nevertheless, if the legislature has said the canal shall be brought to the lands of A. B. from the lands of E. F., and not of C. D., this court would never permit the parties to bring the canal to the lands of A. B. from the lands of C. D.: the parties are obliged to submit to the contract which the legislature has made for them. The result is, that the contract shall be carried into execution; and the King's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to any thing except what the legislature has said shall be done. I have therefore stated, and I have already more than once acted upon the doctrine, that if a deviation from the line marked out by parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another; and, particularly, he might feel that objection in a case where parties, after obtaining from the legislature leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A. B. that the canal should come through the lands of C. D. than through those of E. F.; but to that my answer is, that you have *bargained* with the legislature that you shall do the act they have authorized you to do, and no other act.

There is another consideration to which, I apprehend, this court would feel very much inclined to attend. Individuals come to the legislature, and apply for a canal, or a railway act; and the legislature says, you shall have a canal, or a railway, to run from such a point to such another point; thereby exposing many persons to infinite inconvenience, and in a great measure destroying the comfort of those who have property upon the line through which the canal, or railway, is to pass. I agree that parties must submit to that, if such be the will of the legislature: but, I say, that if individuals go to parliament, and parliament, on being satisfied that the railway or canal can be made at an expense of, say 100,000*l.*, closes with their application, and forms them into a company, with power to raise money to that amount; that authority is given them by parliament, in the full confidence that the sum which they have asked and obtained power to raise, will enable them to execute the work. But, if a case arises in which parties have been enabled by parliament to engage in an undertaking, on a representation that 100,000*l.* would enable them to complete it, and if they find afterwards that 100,000*l.* is not enough for that purpose, this court would, I think, find it very difficult to allow them to proceed with the work till they had obtained further authority, and till they had satisfied parliament that, though they had deceived the legislature in the first instance, they were entitled to obtain an extension of their powers. There is an agreement on the part of those who satisfy parliament, that they can and will do such a work for such a sum of money; and, upon the faith of that understanding, they get the authority to begin the work: but if they deceive parliament, what right have they

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to complain if courts of justice will not allow them to go on with the deception?

It is, therefore, of great importance to see what is the real meaning of this act of parliament; and the question as to its real meaning may be put in this way:—When was the canal, which this act authorized to be made, completed? If, after the canal was completed, the proprietors are to be at liberty to widen and deepen and alter the canal just as they please, what was the use of the act of parliament which gave them power, within certain limits, to make the canal? The proprietors are by this act empowered to buy the land, we will suppose, of A. B.; they are also empowered to buy land of C. D. and E. F. Well, if those parties, A. B., C. D., and E. F., give their consent to the bill, or withhold their opposition while it is passing through parliament, and if the bill be passed into a law, that thing is to be done, and nothing but that which is specified in the act is to be done. But if that thing is done, and the canal is completed, in the sense which the act of parliament means by the word *completed*, and the sense put upon the word by these defendants themselves (as is shown by their going about to levy their tolls on the whole course of the canal), and if, notwithstanding, they may afterwards widen and deepen the canal, what is there to hinder them from carrying it from sea to sea? Why, there would be no end to it. When the canal is *completed*, the powers of the company are exhausted; and, in making the canal, the proprietors are bound to attend to the interests of all whose interests the act of parliament requires them to attend to; and they are not at liberty afterwards to injure the interests of parties by making what is quite a different canal. Not a word is to be found in these acts of parliament giving the least authority to alter the canal after its completion, unless such authority might be considered to be given under the word *improving;* an expression which occurs but twice in the whole course of the first act, and not at all in the second. Taking, however, the whole of the enactments together, I think the effect of that word is not to enable the proprietors to widen and deepen the canal, but to enable them to improve the *works* of the canal (the improving of which works improves the canal), and not to make it a *different* canal.

[His lordship, after remarking at some length upon the course taken by the legal advisers of the canal company, proceeded:—]

In the first act, it was considered expedient to secure the interests of the partnership of Harford, Partridge, and Co., as the owners of the Melin Griffith and Pentyrch Works; and provision is accordingly made, with that view, in the fifth and sixth sections; whereby it is enacted, "That a proper weir shall be made upon the side of the said canal, above the said Melin Griffith Works, within the lands of the said Harford, Partridge, and Co., for the purpose of letting off or conveying the surplus-water, or such as shall not be necessary for the use of the said canal, into the cut or water-course belonging to the said Melin Griffith Works." Then there is a provision made for keeping all this in repair. The meaning to be put upon this provision has been differently stated. But on what ground could the legislature ever have intended to leave it within the power of the proprietors to widen or deepen the canal in such a manner as to require a much larger supply of water? Would that be a rational construction to put upon an act of parliament, which provides that a

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proper weir shall be made upon the side of the canal, for letting off or conveying the surplus water. Under such a construction the persons who had made the canal, on the side of which the weir was to be placed, would be at liberty, the very next day, if they could agree with the land-owners, or had lands of their own through which to cut, to widen, and deepen the canal, so as to render the weir absolutely useless, and to destroy the surplus water altogether, and for as long a period as they chose. It appears to me to be quite impossible to say that this is the meaning of the act of parliament. The true construction I take to be this, that the company of proprietors shall make their canal; that, when they have made it, that is, when they have advertised to the world that it has been made, and have taken tolls from the public as if it were made, they shall not be at liberty to alter it; that, having made their canal, they shall erect this weir upon it, in order to secure to the mills that surplus water which, consistently with such a canal, and the provision for the weir, will, on such an arrangement, remain for the use of these mills. I am, therefore, myself of opinion (and if that opinion is supposed to be wrong, I am perfectly willing that a case should be made upon it for the opinion of the Court of King's Bench), that this was a contract between the parties, and that the larger construction therefore which may belong to some of the expositions or statements of the right claimed by the canal company, in their answer, is a construction which the act of parliament will not warrant.

On a subsequent day, Lord Eldon, in finally disposing of the case, made the following observations:

If my opinion upon the effect of the acts of parliament be right, then, although the owners of these works must take the surplus water, subject to the diminution which an increase of the trade upon the present canal shall occasion, let it increase ever so much or ever so little, I can never agree to the proposition as laid down in some parts of the answer, that the proprietors of the navigation are at liberty to improve the canal for the purpose of bringing upon it an increase of trade, and, by such improvements with a view to a contemplated increase of traffic, to affect the surplus water which was, I apprehend, to be preserved for the benefit of the plaintiff's works.

Supposing the court to be right in its opinion, that the canal company could not do what they were attempting to do, another consideration might then arise; for many cases have occurred in which injunctions are applied for, and are granted or refused, not upon the ground of the right possessed by the parties, but upon the ground of their conduct and dealings before they applied to the court for the injunction to preserve and protect that right. Before proceeding to that point, however, I must observe, that the answer of the defendants does most distinctly admit that, if there should be an increase of trade, there would then be a decrease of water; but then they add, they do not think that such decrease would be a greater injury to the plaintiff than what would arise from an increase of trade upon the canal in its existing state, as now completed. I consider that distinction to be of no importance. If the decrease of water be occasioned by an increase of trade upon the canal as it is now completed, hurtful as that would be to the Melin Griffith and Pentyrch Works, it would not be injurious to them,—*injurious* in the sense which a court of justice puts upon the word; for if, by the necessary operation of the

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act of parliament, and of the arrangements which the legislature has made for the benefit of the owners of the canal on the one hand, and of the owner of these works on the other, an increase of traffic should be occasioned, each of them must take the effect of those arrangements; but if the same, and only the same, consequences were to be produced by an alteration and improvement in the canal (using that term in the sense in which the answer has used it), still, I say, if the alteration be not sanctioned by parliament, you are not to bring about the same consequences by means other than those which the act of parliament has provided. The result amounts to no more than this,—that, if you are doing an act which is to increase the trade, and which is conformable to the provisions of the act of parliament, the consequences, be they what they may, are produced by the act of parliament, and not by you; but, if I am right in point of law, you would not be at liberty to change the operations, for the purpose of producing the *same* effect, without the authority of another act of parliament.

His lordship concluded by directing that the injunction should be varied, and that the defendants should be restrained from further widening or enlarging the said basin, and that the parties should proceed to a trial at law upon two issues, which, as finally settled, were the following:—"First, whether the widening and deepening of the basin in the pleadings mentioned, as the same was widened and deepened before the 28th day of August, 1824, did, and will, to the damage and injury of the plaintiff, diminish the surplus water to the said Pentyrch and Melin Griffith Works, or either of such works, as such supply was provided at the time the canal was completed in 1801?"—"Secondly, whether the further widening or deepening the said basin, as the same was intended to be deepened or widened before the injunction in this cause was granted, would, or might, to the damage and injury of the plaintiff, diminish the supply of surplus water to the said works, or either of them, as such supply was provided at the time the canal was completed in 1801?"

The issues came on for trial in February, 1826, before Lord Wynford, then Chief Justice of the Court of Common Pleas, when, after a trial which lasted three days, the jury found a verdict for the defendants, on the first issue, and for the plaintiff on the second.

On the 10th of June, 1825, the plaintiff filed his second, and on the 13th of May, 1828, his third, supplemental bill against the canal company, and against certain proprietors of adjacent lands, for the purpose of restraining the defendants from commencing or continuing certain other works therein described as being then in contemplation or progress, and of which, as the bill alleged, the direct tendency or effect was, to widen, deepen, or otherwise enlarge the navigation, and to increase the quantity of water required for the consumption of the canal.

On the 25th of June, 1828, Lord Chancellor Lyndhurst directed the trial of certain issues, framed upon the same principle with the issues formerly directed by Lord Eldon; but those issues were never afterwards proceeded with. Lord Lyndhurst, in giving judgment upon that occasion, stated that he concurred with Lord Eldon and Lord Wynford in considering the acts of parliament in the light of a bargain between the company of proprietors and the plaintiff, and in holding, that after the canal was finally completed, the company were no longer at liberty to alter or enlarge it to the damage of Mr. Blakemore. His lordship also observed, that in his view, the opinion expressed by the Court of King's

Bench was not really inconsistent with this construction; and that the *dicta* of the judges, and especially of Mr. Justice Bayley with reference to further improvements, by widening and deepening the canal, were plainly to be understood in a qualified sense, and in connection with the point then directly before the court; and that was a mere question between the company and the freighters, in the consideration of which the rights of Mr. Blakemore as an individual were expressly excluded.

On the 26th of July following, the plaintiff obtained an injunction, restraining the defendants from widening or deepening that part of the canal called the Three-mile Pond. Various other proceedings were at different times had in these causes; and, in the year 1827, the plaintiff commenced an action against the Canal Company for the recovery of damages in respect of the injury sustained by him, by reason of their widening and deepening the canal, and of their having erected the fire-engine in the declaration mentioned. The action was tried at Hereford, and a verdict was found for the plaintiff, on certain of the counts, upon which judgment was entered up in the Court of Exchequer.* The judgment afterwards came, by writ of error, before the Court of Exchequer Chamber, and, ultimately, before the House of Lords, and on both occasions was affirmed. The judgment of the House of Lords upon the writ of error was delivered by Lord Lyndhurst; who, in disposing of the objections which had been raised upon the seventh and twelfth counts of the declaration, expressed himself, with reference to the construction of the acts of parliament, to the following effect:—†

It appears that, previously to the passing of an act of parliament, as far back as the year 1790, the parties, under whom Mr. Blakemore holds the Melin Griffith Works, were in possession of the same works in the same state; and it is alleged in the declaration, and must be taken now, after the verdict, to have been proved, that, at that time, they were entitled to the benefit of the water which passes through a certain cut or water-course from the river Taff, for the use of those works, and by which, in fact, the works were carried on. At that period an act of parliament was passed, establishing a company, the object of which was to form a navigable canal from Merthyr Tidvil to a place called the Bank, near Cardiff. The canal so formed was to be supplied with water from the river Taff, and from other sources in the neighbourhood. It is quite obvious, that the water so drawn from the river Taff, considering the situation of the canal, would be water drawn from that source which supplied the works of Melin Griffith. When the act of parliament was passed, therefore, a provision was introduced into it for the purpose of securing and protecting the interests of the owners of those works. It was provided that there should be a weir in the canal on that side of the canal communicating with the cut or water-course to which I have referred, and that care should be taken that the locks and the gates immediately below the weir should be kept in good repair. A very effectual provision for that purpose was put into the act. The effect of this arrangement was, of course, this,—that the water passing into the Taff would, with the exception of that which was necessary for the purposes of the canal, pass over the weir into the water-course as before, and be made

* Blakemore *v.* Glamorganshire Canal Company, 3 Y. & Jerv. 60.

† The case upon the appeal, together with the judgment of Lord Lyndhurst, is reported at large in 1 Clark & Finnelly, 262.

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use of for the Melin Griffith Works. This was an arrangement made, probably with the consent of parties, but certainly under the authority of the legislature. After this act of parliament was passed, the canal was completed, and the weir constructed. It seems to have been considered, that the parties, at the time, understood what species of canal, and what size, and what form of canal was intended to be made. The act of parliament, however, pointed out no particular dimensions, but it directed the works to be constructed in the manner I have described.

The canal, as the declaration states, was actually formed according to the provisions of the act of parliament; and by the forming of that canal, an apportionment of the water was made under the authority of the legislature. It was competent for the company of proprietors at the time to have made a larger canal; at least, as, in the act of parliament, no limits are prescribed to which the canal was to be confined, we have no reason to suppose the company might not have made a larger canal: but still, they made such an one as they thought necessary and proper. They made that canal, therefore, under the authority of the act,—an act containing a provision for the purpose of securing the owners of the Melin Griffith Works,—and under it they apportioned the water, as between themselves, the proprietors of the canal, and the owners of those works. The question then comes to this, whether, after these works had been so made and completed, under the authority of the legislature; after the water for the Melin Griffith Works had been provided for in the manner I have stated; after the apportionment of the water had been made, as it was made, in pursuance of the provision in the act of parliament;—whether the rights of the parties were not, from that moment, fixed, ascertained, and determined. I am of opinion that they were; and that the company of proprietors of the Glamorganshire canal had no right afterwards to enlarge, and extend, and widen, and deepen their canal, so as to draw a larger quantity of water from the river Taff, and thereby to interfere with the water which had been so apportioned to the Melin Griffith Works, and injuriously to affect their use.

The declaration proceeds to state, that, after the weir had been constructed, and the canal completed, it was the duty of the company of proprietors to abstain from enlarging, widening, deepening, varying, and altering the canal; and that it was their duty to allow the owners of the Melin Griffith Works the fair and reasonable use of the weir that had been made; but that, not regarding their duty in that respect, they had, at a subsequent period, varied, enlarged, widened, and deepened the canal, and had drawn off very large quantities of water, and had thereby, in a great measure, deprived the plaintiff of the benefit of the water, which had been secured to him under the authority of the act of parliament. I conceive that such a case, proved, is a just case for entitling Mr. Blakemore to damages against the company of proprietors; and, if your lordships are also of that opinion, then, as far as relates to the twelfth count, the judgment of the court below will be affirmed.

The seventh count is in substance the same with the twelfth, but it contains an additional, and most important fact, rendering the case stronger, if possible, than it is upon the twelfth count. It states that, in the year 1796, six years after the passing of the original act, another act of parliament was passed relating to the same subject. That act set forth, that the money which had been raised under the former act was not sufficient to enable the company of proprietors of the canal navigation to complete

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all the works; it further stated, that it was desirable that the limits of the canal should be extended to a point beyond the original point; and it gave authority to raise the sum of 10,000*l.* and also a further sum of another 10,000*l.*, under other circumstances, for the purpose of completing the works authorized by the original act, and for the purpose of making the proposed extension. But then, that act of parliament declared, by way of proviso, that all those works begun under the former act, or under this act, should be completed within two years, and that no part of the money should be applied to any of those works that were not completed within the two years. It is said, that the meaning of that proviso is merely this,—not to prohibit the carrying on of the works, after the expiration of the two years, but that, if any of the works remain, at the expiration of the two years, unfinished, the further works shall not be paid for out of the 10,000*l.* which was to be so raised. I am not, however, of that opinion: I think the act of parliament meant to say, that no part of the 10,000*l.* should be applied to any works which should not be completed, and which were not finished within the two years; and further, that it meant to say, that no works should be carried on adversely to the interests of any individual, after the expiration of that period. Six years had already been occupied, at the passing of this second act, in the carrying on of these works; and its object was to fix a time to which parties adverse to the interests of the proprietors should be able to confine them in the prosecution of their further works. That is the reasonable and safe construction, and it is also the clear and intelligible meaning of the act of parliament.

Now, the seventh count states, that the canal was completed at the expiration of the two years; and further, that it was the duty of the company of proprietors, after the expiration of the two years, to abstain from making any enlargement of the canal which should interfere with the interests of Mr. Blakemore; and that, after the expiration of that period, they, notwithstanding, enlarged, widened, and deepened the canal, and thereby took large additional quantities of water from the Melin Griffith Works, to the great injury of Mr. Blakemore: and the question is, whether that seventh count contains a sufficient legal statement of the cause of action. No doubt can, I think, be entertained that this is even a stronger case than that upon the twelfth count; and that it does contain a sufficient legal statement of the cause of action. The rights, as I have before stated, of Mr. Blakemore were fixed in the first instance by the previous act of parliament. The second act gave a certain further time to the company of proprietors to carry on, and alter, and make their works; it must, therefore, reasonably be said to have been intended that, within the two years, any alteration that was to be made, should be made by the company of proprietors, and that no alteration was to be made after the expiration of the two years. Taking into consideration the language of the clause, and the construction which I have considered to apply to it, can we conceive, in justice and propriety, that, after the expiration of the two years, the canal could be enlarged by the company of proprietors in a manner injurious to Mr. Blakemore?

I should recommend your lordships, therefore, upon this seventh count, to affirm the judgment of the court below: the judgment of the corresponding counts, applying to the Pentyrch Works, will likewise be affirmed. The consequence, on the whole, will be, that I shall move your lordships that, in this case, the judgment of the court below be affirmed generally.

On the 4th of June, 1832, the plaintiffs Richard Blakemore, and his

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partner Mr. Booker, filed a fourth supplemental bill against the Canal Company, and against Thomas Powell, who was an extensive shipper of coals at Cardiff. This bill set forth all the previous proceedings already stated, and in particular the proceedings upon the trial of the issues and the action, submitting that, by the judgment of the House of Lords upon the writ of error, it had now been finally settled and determined, that after the expiration of the year 1798 the company of proprietors had no right to commence or carry on any new works adversely to the interests of any individual, or to widen, deepen, or enlarge the canal, so as to interfere with the water which had been apportioned to the plaintiff's works; and farther, that it was an illegal violation of the plaintiff Blakemore's rights as owner of those works, for the company, or any person by their authority, to draw off or divert from the river Taff any quantity of the water, which otherwise would have flowed to such works. The bill further stated that the defendant Powell had, in the year 1829, with the knowledge and connivance of the company, constructed a certain collateral cut or pond communicating with the Sea Lock Basin, and which collateral pond it was alleged was merely a contrivance for enabling the Canal Company to enlarge their canal, and consequently to draw a larger quantity of water from the river Taff, to the injury of the plaintiffs. The bill, among other things, prayed that the injunction against the company (which had already been granted as to the Sea Lock Basin and the Three-mile Pond) might be extended to the whole canal; and it prayed, as against Powell, that he might be ordered to fill up the collateral pond, and in the mean time be restrained from keeping open the communication between such collateral pond and the Sea Lock Basin.

A motion was now made in the original and supplemental causes, that the defendants, the Canal Company, and their agents, might be restrained from using any fire-engine for the purpose of pumping the water of the Taff into the canal; and also from drawing off any part of such water which would otherwise flow to the plaintiff's works through the watercourse before mentioned; and also from permitting water to be supplied to the collateral pond from the Sea Lock Basin, and from continuing the communication between the collateral pond and the Sea Lock Basin, and also from continuing the Sea Lock Basin and the Three-mile Pond, and certain other specified parts of the canal, of any greater depth or width than the same respectively were of at the time when the canal was completed in 1798; and also from allowing the bottom and sides of the canal to remain not sufficiently puddled and secured; and also from continuing to leave the works of the canal, and particularly the two parliamentary weirs, and the locks below those weirs, out of repair; and also for widening, deepening, or otherwise enlarging any part of the canal, and from permitting any alteration to be made therein, or in the locks or works thereof, so as to facilitate the traffic of a greater number of barges, or of barges of larger dimensions than could at the time when the canal was completed pass along the same; and that the defendant Powell might be restrained from keeping open or continuing the communication between the collateral pond and the Sea Lock Pond, or basin, and from supplying the same with water from the Sea Lock Pond.

The affidavit of the defendant Powell (who denied all collusion with the Canal Company) stated, that he conceived himself to be fully warranted by the terms of the act of parliament in forming the collateral cut or pond in question, which was of great value and importance to him

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in his trade as a coal-shipper; that he had accordingly commenced excavating the ground in the year 1829, and that the cut was completed in the month of February, 1830; and that no objection was raised by Blakemore till the month of September, 1831, long after the work had been finished and brought into use.

Mr. Pepys and Mr. Wakefield, for the motion.

The Solicitor-General (Sir W. Horne), Sir E. Sugden, Mr. Swanston, and Mr. Maule, for the Canal Company.

In the course of the discussion several important questions were raised, which, from the view taken of the case by the Lord Chancellor, it became eventually unnecessary to decide. In particular, considerable argument took place touching the soundness of the construction put upon the acts of parliament by Lord Eldon and Lord Lyndhurst, and the extent to which effect was to be given to that construction with reference to improvements in the works of the navigation, as those improvements might affect the supply of water to which the judgment of the House of Lords had declared the plaintiff Blakemore to be entitled. In support of a different construction, much stress was laid on the language said to have been used by Mr. Justice Littledale, in directing the jury upon the trial at Hereford, and by Mr. Justice Bayley in the Court of King's Bench, when the right of the proprietors to improve the canal was incidentally discussed in that court, upon applications relative to the expenditure of the company. The King *v.* Glamorganshire Canal Company, 12 East, 157; The King *v.* The Justices of Glamorganshire, 7 B. & C. 722. For the plaintiff it was contended, that the Canal Company had no right, by the use of improved machinery in their locks, or otherwise, to hold out facilities and encouragement to an increase of traffic, whereby a larger consumption of water would be caused in the canal. On the other hand, it was insisted that, allowing the fullest weight to the judgment of the House of Lords, the company of proprietors were still entitled to take such additional quantity of water as might be required for any increased traffic on the canal; and further, that they were at perfect liberty, by the erection of wharves and landing-places, and by adopting locks, weirs, and basins formed on improved principles, to give every facility to such traffic, provided that the means resorted to for that purpose did in reality occasion directly no larger consumption of water than was necessary theretofore, and provided also that the improvements did not so alter the character of the original canal as to render it substantially a new work.

Much discussion also arose with respect to the jurisdiction of courts of equity to interfere by injunction in cases of apprehended or prospective mischief; and it was strongly urged, on behalf of the Canal Company, that, if the motion were granted in the form and to the extent now sought, the order would, under pretence of restraining the defendants from continuing to allow certain things to be done, in effect compel them to perform positive acts, tending to alter the existing state of matters; a species of relief which, if given at all, could only be decreed at the hearing. Robinson *v.* Lord Byron, 1 Bro. C. C. 588, and Lane *v.* Newdigate, 10 Ves. 192; Rankin *v.* Huskisson, 4 Sim. 13, which were supposed to be authorities for such an order, were in very peculiar circumstances; and the form under which the object was effected in those cases had been frequently disapproved. In addition to the other cases mentioned in the Lord Chancellor's judgment, Coats *v.* The Clarence Railway Company,

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1 Russ. & M. 181, and Weale *v.* West Middlesex Water Works, 1 J. & W. 358, were referred to.

Mr. Jacob, for the defendant Powell, contended, first, that the works carried on by Mr. Powell were fully authorized by the fifty-eighth, fifty-ninth, and sixtieth clauses of the first of the canal acts, and were constructed in strict conformity with the provisions of those clauses; and, secondly, that, independently of that consideration, the plaintiffs, by laying by and allowing the works to be completed without remonstrance or objection, had precluded themselves in a court of equity from being now heard to complain.

December 21.—The Lord Chancellor:—This application, from the great extent to which it is pushed, brings into discussion the proceeding generally by injunction, and the jurisdiction of the court in cases of nuisance. Of that jurisdiction, Lord Eldon says, in The Attorney-General *v.* Cleaver, 18 Ves. 217, that it is very confined and rare, and that more is to be found upon it in the practice of the Exchequer than here; and Lord Redesdale, in his Treatise on Pleading, p. 145, refers to The Attorney-General *v.* Forbes, a case in that court. Lord Eldon observes, that the injunction granted by Lord Loughborough, in The Corporation of London *v.* Bolt, 5 Ves. 129, was the only one within his experience, and that he knew of no precedents for it, but those in Atkyns and Ambler. It is certain that Lord Hardwicke, both in Coulson *v.* White, 3 Atk. 21, and in the anonymous case in Atkyns, vol. iii. p. 758. S. C. Amb. 158, fully recognised the jurisdiction, though in the latter he refused to exercise it, on the ground that the nuisance, if any, was a public one, and should have been proceeded against by information at the suit of the Attorney-General.

But although in these and several later cases the jurisdiction has been acknowledged, and sometimes exercised, both where the nuisance was of a public, and where it was of a private nature, the injunction has been to restrain; to prohibit, not to abate; to prevent irreparable mischief, not to undo what has been done. The application in the anonymous case, which gave rise to Lord Hardwicke's *dicta*, so much cited upon this subject, was to stay the building of a small-pox hospital. Coulson *v.* White, where his lordship states the jurisdiction, perhaps, more broadly than it is laid down in any other authority, refers in terms merely to preventing a nuisance being committed. The Corporation of London *v.* Bolt was to prohibit the defendant from putting more sugars in warehouses, which were overloaded, and in a dangerous state: and Lord Loughborough there said, he could not order any thing to be done. The Attorney-General *v.* Nichol, 16 Ves. 338, and 3 Mer. 687, was an application to stop the raising of a wall higher than it then stood. Notice had been given not to raise; and the wall had, notwithstanding, been raised so high as to be already an obstruction, but no order was made to lower it. In The Attorney-General *v.* Cleaver, Lord Eldon gave it as one reason why he refused the application, and though it only sought to suspend the exercise of the unwholsome trade moved against, yet a suspension would have the effect of dissolving the concern.

The cases which seem to sanction an order for abating are very few, and in peculiar circumstances. An obstruction to the king's highway, or in a harbour which is *quasi* highway, has been ordered to be removed as a public nuisance, at the suit of the crown; as in the case mentioned

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by Lord Hardwicke, Ambler, 160, to have been decided in Lord King's time (a case relating to a street near the Exchange); and in the cases of the Bristol and Portsmouth harbours, and others in the Court of Exchequer. The East India Company *v.* Vincent, 2 Atk. 83, where Lord Hardwicke decreed a wall to be pulled down, did not proceed upon the ground of nuisance, but agreement, and appears to have been, like Franklyn *v.* Tuton, 5 Mad. 469, not a case of injunction, but a decree on a bill for specific performance. On the other hand, in Ryder *v.* Bentham, 1 Ves. sen. 543, Lord Hardwicke said he never had known an order to pull down made on motion, and but rarely by decree; and Lord Thurlow, in another case, 1 Ves. jun. 140, though pressed with the order made by himself in Robinson *v.* Lord Byron, 1 Bro. C. C. 588, and urged to direct that a ditch should be filled up, as well as the further digging restrained, would only grant the prohibiting part of the motion, and refused the ordering part. "I do not," said he, "like granting these injunctions on motion. This ditch may be a mile long. Take an order that he shall do nothing more till answer, or further order." This brings us then to Lane *v.* Newdigate, 10 Ves. 192, which may be said to go to the very uttermost verge of all the former cases, and indirectly to order something to be done, by restraining the party from continuing to keep certain works out of repair. This case appears to have been *ex parte*, and not at all argued. Lord Eldon himself suggested the difficulty of making an order that the repairs should be done. Sir Samuel Romilly said it was no more, in effect, than Lord Thurlow had ordered in Robinson *v.* Lord Byron; but Lord Eldon appears to have thought otherwise, and he refused the order as prayed, directing it, however, in such a manner as to produce the same result, by making it "difficult," his lordship said, "for the defendant to avoid completely repairing the works."

I take leave to agree with Lord Lyndhurst in the opinion that if the court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object, seems to cast a doubt upon the jurisdiction. But Robinson *v.* Lord Byron affords very little countenance to the general proposition; for the injunction issued only a month after the alleged nuisance, and that nuisance was of a varying nature, not the erection of works always producing one effect, but a contrivance by which the defendant sometimes stopped the water, and at other times over-flooded and endangered the mill, saying, that his "object in doing so was to extort money from the plaintiff." The order of the court was to restrain him from "maintaining and using his shuttles, floodgates, erections, and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April, 1785," the order being made on the 7th of May. When we find these two cases so peculiarly circumstanced; and especially that, in the one confessedly coming nearest the point sought to be attained by the present plaintiff, Lord Eldon felt the difficulty so insurmountable, that he could not get over it, but went as it were round it; although we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause; and, without denying the jurisdiction, decline to exercise it.

In the circumstances of the present case, too, there are additional reasons for coming to this determination, to say nothing of the time that has

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elapsed, and the works that have been constructed; and even if it should be granted that no laches can be imputed to the plaintiff, inasmuch as the pendency of the proceedings in other courts prevented him from applying here, still I cannot lay out of view the possible, and not remotely possible consequences of an order, which should compel the defendants either to suspend their navigation altogether, or to restore their works, if that were practicable, to the state and condition in which they were many years ago. Such considerations influenced the court in The Attorney-General *v.* Cleaver, where they existed in a very inferior degree.

The leading principle, then, on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay farther injury, to keep things as they are for the present.

The next, and the only other point to which it is necessary to advert, is the construction put upon the two acts of parliament, the 30 and 36 G. 3., with reference to the time allowed for completing the canal. I say the two acts, for although the question has principally been raised upon the *third section of the thirty-sixth*, yet it seems difficult to construe that without having regard to the thirtieth, and particularly the first section of the thirtieth.

It is now too late to discuss this; for, whatever might have been the merits of the question had it been entire, judicial decisions have given an interpretation to the third section which ought not now to be shaken. Ever since the Court of King's Bench considered the acts as forming a contract between the company and the neighbouring proprietors, it has been judicially held (although it is said that a most able and learned judge expressed a contrary opinion), that the canal should not be altered even within the limits allowed by the earlier acts. Notwithstanding the great weight of decision in support of this construction, the more I consider the frame of the third section, and the point of construction generally, I am the more impressed with the opinion (which I therefore fling out for Mr. Blakemore's best consideration, that he is greatly interested in resting satisfied with the position in which these adjudications have left the question, and, above all, in not further pressing so wild a pretension as that which would stop all improvements of the canal, whereby eventually somewhat more water may seem to be used. To a certain length I think him entitled under the shelter of those decisions, but beyond it I am not prepared to aid him, certainly not in this stage of the cause. The injunctions granted in 1824, as to the Sea Lock Basin, and in 1828, as to the Three-mile Pond, are confined, the one to widening and deepening, the other to widening, deepening, and enlarging the water way: in substance both prohibit the enlargement of the canal. The prohibition now granted will extend to the whole canal, with the addition of these words, "so as directly and by the immediate operation of such enlargement to lessen the supply of water to the Melin Griffith Works, or the Pentyrch Works, or either of them;" and, subject to a like qualification, I will also restrain the company from "erecting, or permitting to be erected or used, any engine other than is now erected and used by them; from making any new cuts, or deepening any cuts already made, com-

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municating with the river Taff, or using any pipes or other contrivances whatever for drawing water from the said river other than are at present used by them, and from altering the locks, weirs, or other works of the canal." I add these words to the qualification, "directly and by the immediate operation of such enlargements, erections, cuts, and deepening," in order to prevent the pretence being set up against every improvement of the canal, that it increases the traffic, which every improvement may do, as by lessening the expenses of the company, and enabling them to reduce their dues. Thus, if a new engine or lock upon an improved principle enabled them to accomplish this end, it would not come within the prohibition. It might, by increasing the traffic, indirectly and mediately increase the consumption of water; but this would not be its direct and immediate operation. If such engine or lock occasioned directly and immediately a greater consumption of water, it would come within this order.

It will be perceived, that, pursuing the leading principle which I began with stating, adopting the constructions imposed by decisions upon the acts, and adapting the principle to that construction, or rather acting upon that construction up to the limits of the principle, the whole motion is now disposed of, with the exception of the part relating to Mr. Powell; for the injunction, as I have given it, being alone granted, all the other parts of the motion are refused, (it is unnecessary to go through them in detail,) upon the grounds which I have stated, except the last clause relating to Mr. Powell, and with respect to him, it is needless to discuss the fifty-eighth, fifty-ninth, and sixtieth sections of the first act, on which he relies, and on which I expressed very considerable doubt in the course of the argument; for the length of time which has elapsed since February, 1830, and perhaps, in some measure, the application of the general principle on which this judgment is grounded, preclude me from granting the injunction, as prayed against him. As against him, therefore, the motion is refused, with costs.

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In a suit against a corporation, to establish eight charitable trusts, of which seven were for the benefit of poor members of the corporation exclusively, and the eighth was subject to a fixed payment to another corporation; it was held, that this latter corporation was a necessary party as the suit was then framed, and as such an addition of parties might render the suit multifarious, leave was given to amend the information, by striking out the matter relating to the charity last mentioned.

November 19, 20; December 21, 1832.

THE information set forth the particulars of the following charitable donations and bequests made to the Company of Merchant Tailors:—First, a sum of 100*l.* given in 1519, by the will of Alderman Heydon, on trust to lend the same in moieties to two young men of the company,

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trading with the sums, for four years to each, they giving security and paying interest at the rate of 3*l.* 6*s.* 8*d.* per cent, which interest was yearly forever to be paid to the Company of Mercers in London. Secondly, a sum of 100*l.* given by Sir T. Rowe, in 1569, to be lent to four housekeepers of the Merchant Tailors' Company, in sums of 12*l.* 10*s.*, for two years, by way of free loan without interest. Thirdly, a sum of 200*l.* given by Dame Mary Ramsay, in 1601, to be lent to the brethren of the company at five per cent for four years, the profit or interest thereof to go to relieve the poor of the company. Fourthly, a sum of 100*l.* given by Richard Shepham, in 1604, to be lent to four young men, artificers of the company, for four years, and so from four years to four years for ever by way of free loan, they paying only 2*s.* 6*d.* for the bond, and 20*d.* to the beadle. Fifthly, a sum of 100*l.* given by Randolph Woolley, in 1615, for free loans to four young men free of the company, using the occupation of tailors, for four years, and so from four years to four years for ever. Sixthly, a sum of 100*l.* given by Edward Renneck, in 1656, to be lent to two young men free of the company for two years, they paying 20*s.* interest each, which was to go to the poor of the company at Christmas yearly. Seventhly, a sum of 500*l.* given by Henry Richards, in 1674, to be lent on good security to young men of the company, at four per cent, for their advancement in trade, the interest to be given among the poor widows and children of the company. Eighthly, a like sum of 500*l.* given by James Church, in 1681, of which sum, 200*l.* was directed to be lent to four young men of the company, from two years to two years for ever, as a free loan, and the interest of the remaining 300*l.* was to be disposed of among the poor of the company. After stating that the several sums aforesaid had been duly received by the defendants, the Company of Merchant Tailors, and that some of the aforesaid annual payments, and in particular that of 3*l.* 6*s.* 8*d.* given by Heydon's will to the Mercers' Company, had been regularly made, the information charged that the said principal moneys had been laid out or invested in the purchase of lands or stock, and had not been lent out or applied according to the trusts declared by the respective donors of the same; but, together with the interest and profits thereof, had been mixed by the defendants with the general funds of the company; and it therefore prayed, that accounts might be taken of what was due from the defendants in respect of the several charities, and that what should be found due from them on those accounts respectively, should be laid out and applied agreeably to the directions of the founders. The Mercers' Company were not made parties to the suit.

To this information, the Merchant Tailors' Company demurred for multifariousness and want of parties; and the Vice-Chancellor having overruled the demurrer on both grounds, the defendants now appealed.

Mr. Knight and Mr. J. Russell, in support of the demurrer, contended, that to comprise in one information no less than eight distinct charitable trusts, each differing in its origin, nature, and objects, was multifarious. The information, besides, was open to another insuperable objection,—the want of parties, in so far as it affected to deal with Alderman Heydon's bequest; for in the due application of that bequest the Mercers' Company had a direct pecuniary interest, and that company was not before the court. Neither could the record be set right by now making the Mercers' Company defendants, for the objection of multifariousness would then apply even more forcibly than it did at present; inasmuch as

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that company might justly complain of being dragged into a chancery suit, seven-eighths of which could have no possible application to them.

Sir E. Sugden and Mr. O. Anderdon, *contrà*, insisted, that no rule of practice or principle of law prohibited a plaintiff from joining in one suit as many different matters as he chose, provided there was but one accounting party, and one party entitled to the account. That was the case here; and considerations of economy and convenience strongly recommended the course that had been taken, instead of filing eight separate informations, one for each of these inconsiderable charities, a course which would have swallowed up the whole fund in costs. It was true the Mercers' Company were interested in one of the bequests, but no complaint had been ever made by them on the subject; and the information stated that the amount of the interest had been always duly accounted for to them; and as no relief was prayed in that respect, it was considered unnecessary to encumber the suit by adding them as parties.

December 21.—The Lord Chancellor:—It would be the greatest possible inconvenience to the proceedings, and the greatest hardship to the parties, were this first objection of multifariousness to prevail, and the Attorney-General or the relator were thus compelled to file eight informations instead of one, each information being in its statement a repetition of the others, *mutatis mutandis*, all making the same charge and praying the same relief. But there is no ground for this, at least as regards the seven last gifts. The party proceeded against is the same, as to all the matters; the subject-matter is the same, moneys given in trust to be lent by the trustees, the company; the parties beneficially interested are the same, the members of the company; one proceeding will suffice for all, and one account only need be taken. I therefore agree with his Honour in holding, that, as regards these seven branches of the information, there is no multifariousness, and that had the first gift, that of Alderman Heydon, not been included, there would have been no ground for the objection. Whether the insertion of that gift alters the case, the direction I am about to give with reference to the second point renders it unnecessary to determine.

Next, as to the first gift, which forms the other ground of demurrer, and raises the question,—ought or not the Mercers' Company to have been made parties,—I am of opinion that they ought: they are directly and clearly interested; they are the only parties beneficially interested in the remaining produce of the fund given; they are equally with the young members of the company interested in its application. The objects of the donor's bounty are in truth two; the young men of the Merchant Tailors' Company, who are to benefit by the accommodation of the loans at a limited rate of interest, and the Mercers' Company, who are to receive that interest. The Attorney-General represents the former as the objects of the charity, and he also represents the poor members of the Merchant Tailors' Company, the young artificers, the widows and children and so forth, being the parties beneficially interested, and having no separate existence, no individual capacity. In all the other seven instances the whole benefit, both from the accommodation of the loans, and, where the loan is upon interest, from the receipt of the interest, goes to objects who can only, as against the trustees, the Merchant Tailors' Company, be represented by the Attorney-General. But in Alderman Heydon's

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gift the case is otherwise; the party interested in the yearly profits is a distinct and several body, the Mercers' Company.

That this company is immediately interested in the information and its event, is manifest. True, the sum of 3*l.* 6*s.* 8*d.* is said to be paid over to them, and the information sets forth that this is alleged by the defendants. Were the Mercers' Company here, they might deny that allegation, which the Attorney-General or the relator may have no interest in disproving, the only object of the suit being, to see the money lent as the donor intended. But, further, a question may arise, whether the Mercers' Company is not entitled to the produce of the land or fund in which the money has been invested, or to the interest beyond 3*l.* 6*s.* 8*d.*, which, though contrary to the direction in the gift, the defendants may have received. At all events, the Mercers' Company is interested in the scheme which may be adopted for laying out the fund and its accumulations, if there be any. It is said, that 3*l.* 6*s.* 8*d.* is to be taken, and no more. Admitting that to be the true construction of the will, may it not happen that so much cannot be obtained? There have been times, assuredly, since 1519, when three per cent, much more 3⅓ per cent, could not be obtained for a loan of money. Would the defendants then be liable to pay at that rate, whether they could obtain it or not? From hence an argument may be raised, that the interest actually obtained, whatever it is, belongs to the Mercers' Company, and not the fixed sum of 3*l.* 6*s.* 8*d.* But surely it behoves the company on this very account to be present in this suit, and to watch over its interests in the inquiry as to the disposal of the fund, and in the directions for its future management. In whatever view the question is regarded, the Mercers' Company ought to be here. Either the decree will bind them, as being *quasi in rem* and the suit of a public nature, the Attorney-General representing the crown, and the relator putting the powers of the crown in motion; or the decree will not bind them, they not being parties or privies to the suit. If the decree binds them and concludes the whole matter as to the disposal of funds, and the determination of points wherein they are interested, it is manifestly against all justice that they should not be made parties, and have an opportunity of appearing for their interest. If it does not bind them, then the suit cannot finally decide the question, but must give rise to further proceedings. So that in every view they ought to be parties.

The Attorney-General must have leave to amend, which he may do by striking out the first matter in the information.

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account. A. obtained a bill for the sum from a country banker, and remitted it to his bankers in London, without stating the reason for which the amount had been paid to him. At the same time he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A. died, and a few days afterwards the bill became due, and was paid, and the bankers carried the amount to A.'s general account. The bankers, for some time after they had received notice, from the client, of the circumstances under which the amount of the bill had been paid to A. continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix: Held, that as there was no agreement binding the bankers to keep separate accounts as to the 450*l.*, and the amount of the bill, and as they had no notice, till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill. *Grigg* v. *Cocks*, 202

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1, An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judgment for 2100*l.* entered up against A. and C. The annuity remained unpaid from January, 1823, A. having left the country, and, in February, 1824, C. became bankrupt, and afterwards obtained his certificate. C. having died, B. filed a bill to have the arrears of the annuity paid out of his real and personal estates: Held, that neither the value of the annuity

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nor the sum due on the judgment was provable under C.'s commission, and, therefore, that his certificate was not a bar to the plaintiff's demand. *Johnson* v. *Compton*, 20

2, A. and B. entered into partnership as brewers, A. bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, &c. at a valuation; but the amount was not to be paid till the mortgages were satisfied. B. becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages: Held, that the assignees were entitled to deduct the sums paid by them, from the dividends on the sum which was due to A. from B. at the time of his bankruptcy. *Rowe* v. *Anderson*, 123

3, A., tenant in fee of a cotton-mill, in which there were a steam-engine, boilers, &c., mortgaged the mill, engine, boilers, &c., to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building: Held, that the steam engine was not in the order and disposition of A. at his bankruptcy. *Hubbard* v. *Bagshaw*, 148

4, A. B. and C. having agreed for the purchase of certain mines for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold, to the company, for 25,000*l.*, of which 10,000*l.* should be paid to F. the proprietor, and the remainder divided amongst themselves and certain of their friends whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which A. B. and C. were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to F.; and a conveyance was afterwards taken from F. to the trustees of the company, and the 25,000*l.* was paid, out of the funds of the company, and distributed in the manner agreed upon. A suit having been instituted, by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had received into court, under an order upon motion, held, that the plaintiffs were entitled to receive that sum, and where not to be put to prove their demand under the commission. *Hichens* v. *Congreve*, 193

5, A. a ship-owner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party afterwards was delivered to B. by A.'s direction, and B. gave notice, of the assignment, to C. Afterwards, but before the ship returned, A. became bankrupt: Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Douglas* v. *Russell*, 239

6, A. granted an annuity to B., and covenanted to charge, any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. A. became bankrupt, and afterwards obtained his certificate, and then his wife died, having, under

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a power in her settlement, bequeathed to him an annuity of 700*l.* A. was decreed to execute a proper deed to charge the annuity of 700*l.* with payment of the annuity granted to B. *Lyde* v. *Mynn*, 229

7, The 12th of the new orders does not apply to affidavits in bankruptcy which have been referred for scandal and impertinence. *Ex parte Chester, in re Yates*, 7

BILL OF REVIVOR.

1, A bill of revivor against new parties, ought to state so much of the original bill as shows that the plaintiff is entitled to revive, otherwise it is demurrable. *Phelps* v. *Sproule*, 144

2, A. died, having made B. his executor, who, without proving A.'s will, possessed part of his assets. B. died and made C. his executrix, who proved his will and took out administration to A. A bill was filed against C. for an account of A.'s assets possessed by her and by B. Afterwards C. died, having made D. her executor, and E. took out administration to A. Plaintiff filed a bill of revivor and supplement against D. and E., to which D. demurred, and the demurrer was allowed. *Ibid.* 146

CHAMPERTY.

B. claiming to be tenant in tail, with remainder to C. in fee, of lands in the adverse possession of D. conveys, by lease and release, all his interets to C. Held, that the conveyance is not within 32 Hen. 8. c. 9. *Anson* v. *Lee*, 167

CLAIM.

Testator gave 100*l.* to each of the children of his sisters provided they claimed the same, within five years after his decease, by writing under their hands, delivered to his executors. No claim was made by the children in the manner prescribed; but within the five years a bill was filed by the residuary legatees to have the testator's estate administered. Held, that the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit. *Tollner* v. *Marriott*, 10

CLERGYMAN.

A clergyman granted an annuity, and secured it by a conveyance of his benefice, and by a warrant of attorney. Held, that the conveyance was void, but the warrant of attorney good. *Aberdeen* v. *Newland*, 127

COMMISSION TO EXAMINE WITNESSES.

1, A defendant who has joined in commission, cannot obtain a new commission, except upon a special application and with notice. *Bond* v. *Bond*, 236

2, An action having been brought against the plaintiffs, whose witnesses were about to leave England for New York, they applied to the Chief Justice of the King's Bench, under 1 Will. 4, c. 22, for a commission to examine their witnesses before the trial. But his lordship ordered them to be examined *vivâ voce* before a gentleman of the bar, with liberty to the defendants to attend and cross-examine them. The plaintiffs took no proceedings under that order, but their witnesses having shortly afterwards gone to New York, they filed a bill in this court, and

COMMISSION TO EXAMINE WITNESSES.
afterwards moved for a commission to examine their witness there. Motion granted. *Grinnell* v. *Cobbold*, 249

CONSTRUCTION.
1, Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children; the son left four daughters (one of whom was his eldest child) and a son: Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an eldest son only. *Hall* v. *Luckup*, 3
2, Testator gave 1000*l.* to his natural son, and, if he died under twenty-one, then that sum and the residue to go to the testator's family: and he gave the residue to his natural son to be applied as above directed. The son died under twenty-one: Held, that the 1000*l.* was part of the residue, and did not pass to the testator's next of kin as a legacy. *Breashur* v. *Dor*, 11
3, The ultimate trust declared in a settlement of a sum to be raised out of the husband's estate, was for the executors or administrators of the wife, who afterwards died in her husband's lifetime: Held, that the next of kin of the wife were entitled to the money, such appearing, from the provision of the settlement, to have been the intention of the parties. *Bulmer* v. *Jay*, 26
4, A. by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estate which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage, equally: some of the children of the marriage died in the lifetime of A. and his wife: Held, that under this covenant, all the children became entitled to vested interests, on their coming into existence; and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate), having, by his will, given his real and personal estates, to the same persons, some of whom exclusively claimed, the real estates, under the covenant, a case of election arose. *Naylor* v. *Wetherell*, 58
5, Bequest to A. for life, and, after her decease, to her children, when they arrived at twenty-one: A. had two children, both of whom attained twenty-one: Held, that they were tenants in common. *Woodgate* v. *Unwin*, 66
6, By a deed declaring the trusts of the proceeds of real estates, the share of a married daughter of the grantor, was directed to be paid into her proper hands, for her own use and benefit, and the same words were used in declaring the trusts of the shares of the grantor's sons: Held, that the married daughter was not entitled to her share, for her separate use. *Tyler* v. *Lake*, 160
7, By the settlement on the second marriage of A. his intended wife's father settled estates on himself for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage; and the trustees were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children during their minorities; and A. covenanted to permit his intended wife to enjoy any future property that might accrue to her for her separate use; and her father covenanted that all the personal property he should

die possessed of, should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions, qualifications or charges, that he might make by his will. The father died, having bequeathed his residuary estate to A. and appointed him his executor. A. entered into possession of the settled estates, and received the rents and mixed them with his own moneys. There was issue of the marriage two children. A. maintained them at his own expense, and died having by his will given them benefits in real estates which it was alleged he had purchased, in part, with the rents of the settled estates: Held, that A. was a purchaser of the trust, for the maintenance and education of the children, and that his executors were entitled to be allowed, in account, the sums which it would have been proper to apply for those purposes. That the covenant by the father of the wife, was a provision against intestacy only. That the sums due from A. to his children, being a debt, were not satisfied by the benefits given them by his will; but an inquiry was directed as to what part of the real estates devised for their benefit, had been purchased, by A. out of the rents of the settled estates. *Stocken* v. *Stocken*, 77

8, W. G. by his will dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T. G. the nephew's eldest son, after his father's death, suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure and raising portions for his younger children, to his first and other sons in tail male. S. F. by his will, dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male: provided that if the lands devised by W. G. to T. G. in tail male, should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof; then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved were dead without issue. T. G. had three sons: the eldest died in his lifetime; then T. G. died: Held, that as W. G.'s estates came to S. G.'s second son encumbered with the term, S. F.'s estates did not go over under the shifting clause. *Fazakerly* v. *Ford*, 179

9, Testator bequeathed his residuary estate to trustees, in trust, as to one third, for his daughter for life, and after her decease, in trust for her children, and to be paid to them on attaining twenty-five; but if his daughter should leave but one child her surviving, then the whole third to go to and become the property of such only child upon its attaining twenty-five, and be transmissible to its executors; but, in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over: Held, that the bequest to the children, was void for remoteness. *Hunter* v. *Judd*, 210

10, An act of parliament reciting a will, by which estates were devised to A. for life, remainder to his first and other sons in tail, remainder to B. in tail, and that B. had suffered a recovery to the use of A. in fee; directed the estates to be sold, and other estates to be purchased and conveyed to such of the uses of the will as, at the time of the sale,

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should be existing, undetermined, and capable of taking effect. The estates were sold and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, &c: Held, that B. did not take an estate tail in the purchased estates. *Wortham* v. *Mackinnon*, 219

11, By a marriage settlement an annuity for the life of the wife's mother was assigned to trustees for the wife for life, remainder for the husband for life, remainder for the issue of the marriage. Provided, that if the husband should during the life of the wife or of her mother, become bankrupt, compound with or assign his effects for the benefit of his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, and signed an unstamped agreement to deposit the settlement with him, and authorizing him to retain the annuity so sold, out of the settled annuity: Held, that the husband had forfeited his interest in the settled annuity. *Stephens* v. *James*, 226

CONSTRUCTION OF NEW ORDERS.

1, The fourth of Lord Lyndhurst's orders relates to exceptions for insufficiency only. *Bradbury* v. *Booker*, 147

2, If the Master does not decide, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, unless by consent. *Gibbs* v. *Payne*, 253

COSTS.

1, If a plaintiff gives a notice of motion, and dies before it is made, and his executors revive, the court will not give the defendants the costs as of a motion abandoned. *Warner* v. *Armstrong*, 72

2, In a creditor's suit, the plaintiffs are entitled to their costs, as between solicitor and client, though the fund is insufficient to pay the debts. *Tootal* v. *Spicer*, 231

3, If on a demurrer, *ore tenus*, for want of parties, the plaintiff wishes to have permission to amend his bill more extensively than by merely adding parties, he must pay the costs of the demurrer. *Newton* v. *The Earl of Egmont*, 260

4, A mortgagor having taken the benefit of the Insolvent Act, the provisional assignee was made a defendant to a suit to foreclose. He put in an answer claiming no interest in the premises, except such, if any, as he was entitled to as provisional assignee: Held, that the plaintiff ought to pay him his costs, and add them to his debt. *Woodward* v. *Haddon*, 275

5, Plaintiff sets down a plea to be argued: and afterwards moves that it may not stand in the paper, and gets an order to amend his bill. The defendant is entitled to taxed costs. *Jones* v. *Wattier*, 65

6, Where the plaintiff is out of the jurisdiction, a defendant is at liberty to require the security of solvent persons to be given, for costs. *Cliffe* v. *Wilkinson*, 62

7, A plaintiff resident out of the jurisdiction, allowed to pay 120*l.* into court, in lieu of giving security for costs in the usual manner. *Ibid.*

8, The bill had been dismissed at the hearing, with costs, which the plaintiff refusing to pay, he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody,

COSTS.

upon bail, but retook him before the writ was returnable. The court refused to order the sheriff to pay the costs. *Collard* v. *Hare*, 294

DEBTOR AND CREDITOR.

1, The court will not decree a specialty debt to be paid out of the deceased's real estates, unless the creditor sues on behalf of himself and all other the specialty creditors; but leave will be given to amend the bill at the hearing. *Johnson* v. *Compton*, 20

2, A married woman having separate property, and living apart from her husband, employed the plaintiffs, as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property: Held, that the property was liable to pay the bills. *Murray* v. *Barlee*, 43

3, A. and B. entered into partnership as brewers, A. bringing in as his share of the capital, a brewhouse and other premises which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, &c. at a valuation, but the amount was not to be paid till the mortgages were satisfied. B. becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respects of A.'s debt, paid off the mortgages. Held, that the assignee was entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of his bankruptcy. *Rowe* v. *Anderson*, 123

4, A. a solicitor in the country, received from a client a sum of money, which was to be paid, by him, into the Court of Chancery on the client's account. A. obtained a bill for the sum from a country banker, and remitted it to his bankers in London, without stating the reason for which the amount had been paid to him. At the same time, he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A. died, and a few days afterwards, the bill became due and was paid, and the bankers carried the amount to A.'s general account. The bankers, for some time after they had received notice, from the client, of the circumstances under which the amount of the bill had been paid to A. continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix: Held, that as there was no agreement binding the bankers to keep separate accounts as to the 450*l.* and the amount of the bill, and as they had no notice till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill. *Grigg* v. *Cocks*, 202

5, If in action by a bond creditor against the heir of an intestate, the latter plead a false plea, the court will, after a decree obtained, in a suit by another creditor, for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. *Price* v. *Evans and Wife*, 234

6, An owner of a ship assigned fifteen-sixteenths of it to his creditor, in trust to sell, and retain his debt, and afterwards became bankrupt. The ship was afterwards sold: Held, that the creditor must bear his proportion of the seamens' wages and other expenses on account of the ship. *Douglas* v. *Russell*, 239

DEBTOR AND CREDITOR.

7, A testator directed the sum of 2000*l.* to be raised out of a certain freehold estate, and paid in satisfaction of certain specified debts, and all such other debts as he should owe at his decease; and he gave the rest, residue and remainder of his estate and effects, real and personal, to his wife, her heirs, &c.: Held, that the 2000*l.* was the primary fund for the payment of the debts. *Clutterbuck* v. *Clutterbuck*, 475

8, A person conveyed estates to trustees upon trust to sell and apply the produce of sale in discharging all his bond debts, *together with the interest then due and to grow due for the same, to the day of payment.* A bond creditor claiming under this deed is not entitled to principal and interest beyond the amount of the penalty of the bond. *Hughes* v. *Wynne*, 447

DEFENDANT.

1, What is sufficient *primâ facie* evidence that a defendant is out of the jurisdiction. *Johnson* v. *Compton*, 20

2, Leave given them to file a supplemental answer for the purpose of stating facts which the defendant had wished to state in his original answer, but had been prevailed upon to omit, by the mistaken advice of his solicitor. *Nail* v. *Punter*, 214

DEMURRER.

If a general demurrer is overruled, but leave is given to amend, and the bill is amended by adding a party merely, the defendant may nevertheless put in a general demurrer to the amended bill. *Bosanquet* v. *Marsham*, 259

DISMISSAL OF BILL.

Executor of a deceased plaintiff filed a bill of revivor, but did not obtain an order to revive. Motion, by defendant, that the executor might revive within a given time, or both bills be dismissed with costs to be paid by the executor. Motion granted as to the bill of revivor only. *Troward* v. *Bingham*, 218

ELECTION.

1, A. by his marriage settlement, covenanted that he would, by his will, or otherwise, settle all the real and personal estate which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage, equally: some of the children of the marriage died in the lifetime of A. and his wife: Held, that under this covenant, all the children became entitled to vested interests, on their coming into existence: and that A. (who, as administrator to some of his deceased children, had become entitled to their shares of his personal estate) having, by his will, given both his real and personal estates to the same persons, some of whom exclusively claimed the real estates, under the covenant, a case of election arose. *Nayler* v. *Wetherell*, 58

2, A testator devised all his estates and effects, both real and personal which he should die possessed of, interested in or entitled to upon certain trusts for the benefit of his grandchildren, one of whom was his heir. The testator afterwards purchased other lands: Held, that the heir must elect between the benefits given him by the will, and the after-purchased lands which had descended upon him. *Churchman* v. *Ireland*, 237

ELECTION.

3, A testator, before making his will, transferred two sums of four per cents and five per cents, which were then the whole of his funded property, into the joint names of himself and his wife. By his will he bequeathed all *his* funded property or estate of what kind soever, to trustees, in trust for his wife for life, and, after his decease, in trust (amongst other things) to pay certain legacies of four per cent stock, amounting, within 50*l.*, to the stock of that description, which he had so transferred; and he gave the residue of his estate to A. & B. He afterwards purchased further sums of five per cents, in the names of himself and his wife, and died in her lifetime, having no stock except that before mentioned, exclusive of which his property was not sufficient to pay his legacies: Held, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took, under the will, in certain parts of the testator's property. *Dummer* v. *Pitcher*, 306

EQUITABLE ASSIGNMENT.

A. having contracted to pay to B. 2360*l.* by instalments, B. signed and gave to C. for valuable consideration, a paper authorizing A. to pay part of each instalment to C. and 460*l.* to be reserved in A.'s hands out of the balance of the contract, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day on which it was signed: Held, that the writing was an equitable assignment of the sums mentioned in it, to C. *Lett* v. *Morris*, 276

EQUITY OF REDEMPTION.

A. tenant in tail, under his brother's will, with remainder over, suffers a recovery to such uses as he should appoint by deed or will, and subject thereto to the uses of the will. He afterwards makes a mortgage of part of the estates in fee, and limits the equity of redemption to the prior uses. He then joins in a transfer of the mortgage, and reserves the equity of redemption to himself in fee: Held, that the equity of redemption did not revert to the old uses. *Anson* v. *Lee*, 176

EVIDENCE.

1, A copy of a faculty granted in 1613 admitted as evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository, which had been destroyed by the great fire of London. *Isham* v. *Wallace*, 13

2, What is sufficient *primâ facie* evidence that a defendant is out of the jurisdiction. *Johnson* v. *Compton*, 20

3, The plaintiffs sued as devisees of A. but omitted to prove his will, and the bill was dismissed. They afterwards presented a petition of re-hearing, and moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, and the will not being the subject of dispute in the cause. *Hood* v. *Pimm*, 52

4, In a suit for tithes by a rector against occupiers, the defendants pleaded a modus to be payable, to the vicar, for the tithes claimed: Held, 1st, that a copy of the vicar's endowment, contained in an old book, recording the

EVIDENCE.

acts of former bishops of the diocese, was admissible for the plaintiff, (the bishop's registry having been searched, for the original, without success,) and that no search was necessary, either in the augmentation office, or in the vicar's house, although it was expressed, in the instrument, that one part of it was to remain with the vicar. 2d. That a terrier appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved, and by the churchwardens, was admissible, for the plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. 3d. That the decrees, but not the interrogatories and depositions, in two former suits, one in the Exchequer, and the other in Chancery, for the tithes of a particular farm in the parish, but which was not included in the present suit, were admissible for the defendant. *Tucker* v. *Wilkins*, 120

5, Bishop Wells' *Liber de Ordinationibus Vicariorum* received in evidence. *Ibid.*

6, A defendant became bankrupt during the examination of witnesses, and a supplemental bill was filed against his assignees: Held, that the depositions taken after the commission issued and before the supplemental cause was at issue, could not be read against the assignees. *Hichens* v. *Congreve*, 193

7, An owner of lands in the parish, is a good witness to prove the custody of old receipts for moduses, alleged to be payable for his lands, notwithstanding he has agreed to contribute to the costs of the suit. *Tomlinson* v. *Lymer*, 213

8, An occupier of a cottage and garden in the parish is a good witness in support of a modus for milk and calves. *Ibid.*

9, If the Master does not decide, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, unless by consent. *Gibbs* v. *Payne*, 253

EXAMINATION.

Motion to discharge a Master's certificate of the sufficiency of the defendant's examination under a decree, refused; the proper course being to except to the Master's certificate. *Chalk* v. *Thompson*, 159

EXECUTORS AND ADMINISTRATORS.

1, The ultimate trust declared, in a settlement, of a sum to be raised out of the husband's estate, was for the executors or administrators of the wife, who afterwards died in her husband's lifetime: Held, that the next of kin of the wife were entitled to the money, such appearing, from the provision of the settlement, to have been the intention of the parties. *Bulmer* v. *Jay*, 26

2, The court refused to allow 2210*l.* for the funeral expenses of a deceased nobleman whose personal estate was believed to be solvent at his death, but ultimately, from unforseen circumstances, proved to be insolvent. *Bissett* v. *Antrobus*, 232

EXPECTANT HEIR.

1, A sale by an heir apparent, of interests in possession and in reversion, set aside, the consideration being inadequate, and advantage having been

EXPECTANT HEIR.

taken of the vendor's embarrassments. *The Earl of Portmore* v. *Taylor*, 92

2, Injunction granted to restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money. *King* v. *Hamlet*, 111

FEME COVERTE.

1, A married woman, having separate property, and living apart from her husband, employed the plaintiffs, as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property: Held, that that property was liable to pay the bills. *Murray* v. *Barlee*, 43

2, By a deed declaring the trusts of the proceeds of real estates the share of a married daughter of the grantor, was directed to be paid into her proper hands, for her own use and benefit, and the same words were used in declaring the trusts of the shares of the grantor's sons: Held, that the married daughter was not entitled to her share for her separate use. *Tyler* v. *Lake*, 74

3, A married lady being entitled to a share of real estates directed to be sold, joined with her husband in assigning, and levying a fine of her share, to a mortgagee: Held, that she was barred of her equity to a settlement. *May* v. *Roper*, 164

FINE.

A married lady being entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assigning, and levying a fine of her share, to a mortgagee: Held, that she was barred of her equity to a settlement. *May* v. *Roper*, 164

FUNERAL EXPENSES.

The court refused to allow 2210*l.* for the funeral expenses of a deceased nobleman whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent. *Bissett* v. *Antrobus*, 232

GLAMORGANSHIRE CANAL ACT, CONSTRUCTION OF.

Principles applicable to the construction of acts of parliament establishing public companies with extraordinary powers for the execution of works of local or general utility. *Blakemore* v. *The Glamorganshire Canal Navigation*, 544

HEIR.

If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved. *Robinson* v. *Cooper*, and *Lock* v. *Foote*, 67

HUSBAND AND WIFE.

1, The late Duchess of N. being entitled to pin-money charged upon estates to which the duke was entitled for his life, became a lunatic in 1782, and continued so till 1820, when she died. The late duke received all the rents of the estates, and maintained the duchess according to her rank. Held, that as the duchess was incapable of consenting to or

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acquiescing in the duke's retaining her pin-money, his estate was accountable for all the arrears of the pin-money. *Earl Digby* v. *Howard*, 267

2, A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held, (reversing the decision of the court below,) that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver. *Fennen* v. *Taylor*, 453

INCLOSURE ACT.

The general inclosure act, so far as it enacts that the commissioner's oath, and the appointment of any new commissioner, shall be annexed to and enrolled with the award, is merely directory.

An inclosure act directed allotments to be made to A. as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as rector, and for his right of common. Part of the waste had been used by the lord as a rabbit-warren, but no mention of it, as such, was made in the inclosure act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three other allotments as a full compensation for his rights abovementioned: Held, that A.'s title to the allotment in respect of the warren could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil. *Casamajor* v. *Strode*, 332

INFANT.

1, A testator by his will expressly excluded his wife from the guardianship of his children, and directed that, if she should obtain possession of them, the provision he had made for their maintenance should cease; and he appointed his executors to be their guardians. After the testator's death, his widow, as the answer alleged, forcibly removed one of the daughters from a school at which her father had placed her in his lifetime, and took the child abroad. She then filed a bill, as next friend of the children, against the executors, for an account of the testator's estate. The court directed the account to be taken, but referred it to the Master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made. *Arnott* v. *Bleasdale*, 177

2, Testator devised his real and personal estates, to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren, till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and on the death of each of them leaving such child, to convey the parent's share to such child: and he empowered his trustees, after the death of the father of his grandchildren, to convey, to his grandsons, absolutely, the shares of his estates, to which, under the previous trusts, they would be entitled for their lives. A petition, by one of the grandsons, for an increase of the maintenance provided by the testator, was refused, the

INFANT.

disposition of the property not being such as that the grandchildren must, of necessity, take the whole fund. *Turner* v. *Turner*, 198

3, A ward of the court married, under twenty-one, with the consent of her father, but without the consent of the court; and prior to her marriage, a settlement was made of her property. On her attaining twenty-one, she and her husband applied to have her property transferred to the trustees, which was ordered upon her being examined separately, and consenting. *Leeds* v. *Barnardiston*, 245

INFANT HEIR.

1, The testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance of the purchaser, under the 1 W. 4. c. 47, s. 11. *Brook* v. *Smith*, 403

2, The eleventh section of the 1 W. 4. c. 47, extended to a case where the decree in the cause was made prior to the act. *Chapman* v. *Tenant*, 403

INFORMATION.

After exceptions had been allowed to an answer to an information, the court being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the Attorney-General, to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the suit, in the meantime. *Attorney-General* v. *The Corporation of Carlisle*, 127

INJUNCTION.

1, Injunction granted to restrain the commissioners of woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement, entered into, by them, with the plaintiffs, for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 7

2, A solicitor whose bill had been taxed and more than one-sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the court granted an injunction to restrain the action. *Barr* v. *Wiggins*, 64

3, Injunction granted to restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money. *King* v. *Hamlet*, 111

4, Injunction granted to prevent the obstruction of ancient lights, against a lessee of an ecclesiastical corporation, subject to the plaintiffs establishing their right to the easement, in an action. *Sutton* v. *Lord Montfort*, 255

5, A. granted a lease for twenty-one years to B., with a proviso determining the lease and giving A. a right of re-entry, no non-performance of any of the covenants in the lease, and A. covenanted that, at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years. B. paid all his rent, and continued in possession after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A. in his answer, set up the breaches of covenant, and denied having had notice of them till after the

INJUNCTION.

end of the term. Motion for the injunction refused. *Thompson* v. *Guyon*, 321

6, An order that a defendant in contempt for breach of an injunction, shall stand committed, unless cause be shown on a stated day, is not irregular if it be personally served. *Durant* v. *Moore*, 382.

7, On an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matters in *statu quo*, and will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined.

Effect of laches in depriving a party of his remedy by injunction. *Blakemore* v. *The Glamorganshire Canal Navigation*, 544

INSOLVENT.

1, A mortgagor having taken the benefit of the Insolvent Act, the provisional assignee was made a defendant to a suit to foreclose. He put in an answer claiming no interest in the premises, except such (if any) as he was entitled to, as provisional assignee: Held, that the plaintiff ought to pay him his costs, and add them to his debt. *Woodward* v. *Hadden*, 275

2, A testator bequeathed a legacy of 400*l.* to his executors, upon trusts to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner as they should in their judgment and discretion think best: Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent.

In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the defendant to object that the suit has been instituted without the consent of the major part in value of the creditors, as required by the bankrupt and insolvent debtor's acts. The judgment in such a suit will bind the creditors, but the assignees take upon themselves the responsibility that the suit has been properly instituted and properly conducted. *Piercy* v. *Roberts*, 469

INSPECTION OF PAPERS.

1, Where books and papers, the joint property of the defendants and of other persons not before the court, were admitted, by the answer, to be in the custody of a third party, as the common agent of all, an order was made upon such agent to permit an inspection by the plaintiff, against the consent of those owners who were not parties, on the principle that the court has a right to give the plaintiff whatever access the defendant himself would be entitled to.

An application to stay the execution of the order for production, pending an appeal to the House of Lords, against the order, was refused with costs. *Walburn* v. *Ingilby*, 498

2, On a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants by their answer admitted that they had in their custody, and relating to the matters mentioned in the bill, divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and documents evidencing their title to the dues in question: Held, that the plaintiffs in equity were not entitled to an inspection of such cases or deeds. *Bolton* v. *Corporation of Liverpool*, 511

INSURANCE.

The court will not relieve a tenant against the breach of covenant to insure. *Green* v. *Bridges*, 50

INTERPLEADER.

1, A. deposited goods with B., a warehousemen, to await his directions. Afterwards A. directed B. to transfer the goods to C. and to hold them at his disposal: and B. made the transfer accordingly. The goods were then claimed by D. as having been consigned, to him, by A: Held, that B. was entitled to file a bill of interpleader aganst C. and D. *Pearson* v. *Cardon*, 108

2, A. delivered goods to B. a warfinger, to be kept for him; and afterwards directed B. to transfer them to C., which was done. D. then gave notice to B. not to deliver the goods to any one but him, and thereupon B. refused to deliver the goods to C., upon which C. brought trover against B., and B. filed a bill of interpleader. Afterwards D. abandoned all claim to the goods and withdrew his notice: Held, that the case was a proper case of interpleader, and that D., who had occasioned the suit, must pay to the plaintiff, and the other defendants, their costs at law and in equity. *Mason* v. *Hamilton*, 298

ISSUE.

A motion for a new trial of two issues, was made upon three grounds: first, the alleged improper summing up of the judge; secondly, because the weight of evidence was against the verdict; and, thirdly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground, that, upon the evidence alone, without regard to the summing up of the judge, the court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

Semble. The rule is not universal, that on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

Semble. That rule does not apply, where the bill is filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tatham* v. *Wright*, 336

JOINT STOCK COMPANY.

A. B. and C. having agreed for the purchase of certain mines for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold, to the company, for 25,000*l.*, of which 10,000*l.* should be paid to F. the proprietor, and the remainder divided amongst themselves and certain of their friends whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which A. B. and C. were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to F.; and a conveyance was afterwards taken from F. to the trustees of the company, and the 25,000*l.* was paid, out of the funds of the company, and distributed in the manner agreed upon. A suit having been instituted, by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had

JOINT STOCK COMPANY.

received into court, under an order upon motion: Held, that the plaintiffs were entitled to receive that sum, and where not to be put to prove their demand under the commission. *Hichens* v. *Congreve*, 193

JUDGMENT.

1, A. being possessed of a leasehold house, deposited the lease with B. as a security for the debt. C. afterwards obtained a judgment against A., and sued out a *fi. fa.* The sheriff sold some of A.'s goods, but not the house, and returned the writ: whilst the writ was in the sheriff's hands, D., with A.'s consent, paid the debt due to B. and had the lease deposited with him as a security for the amount, and for other sums due to him, from A. Held, that C. having allowed the writ to be returned, without requiring the sheriff to sell the house, had no priority over D. *Williams* v. *Craddock*, 142

2, A father, tenant for life, with remainder to his son in tail, joins with his son in conveying the estate to trustees in trust to sell, and to pay 30,000*l.* to the father and the residue to the son; and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to defendant, and afterwards judgments were entered up against the father: Held, that the existence of the judgments was no objection to the title. *Lodge* v. *Lyseley*, 37

JURISDICTION.

1, Injunction granted to restrain the commissioners of woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into, by them, with the plaintiffs, for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 7

2, If a party claims, before the commissioners appointed under the conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government, in a character which he really sustains, and an award is made to him in that character, this court has no jurisdiction to interfere, at the suit of a party claiming to have a better title to the compensation. *Lloyd* v. *Lord Trimlestown*, 134

3, The court has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit. *Frankland* v. *Lucas*, 266

LANDLORD AND TENANT.

The court will not relieve a tenant against the breach of a covenant to insure. *Green* v. *Bridges*, 50

LEGACY AND LEGATEE.

1, Testator gave 100*l.* to each of the children of his sisters, provided they claimed the same within five years after his decease, by writing under their hands, delivered to his executors. No claim was made by the children in the manner prescribed; but, within the five years, a bill was filed by the residuary legatees, to have the testator's estate administered. Held, that the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit. *Tollner* v. *Marriott*, 10

2, Testator devised real estates to A. for life, remainder to B. in fee. And he gave a legacy to C., to be paid to her by B., within twelve months after A.'s death: and he charged his estate with the legacy, and appointed A. his executrix; C. died in A.'s lifetime: Held, that the legacy did not lapse. *Poole* v. *Terry*, 133

LEGACY AND LEGATEE.

3, Testator devised all his real estates to trustees, in trust to convey his lands in W. to A. when, and so soon as he should attain twenty-one, but in case he should die under that age, and without leaving issue, then over; and when B. should attain twenty-four, in trust to convey the rest of the real estates to him, *on his giving security for the annuities given by the testator, and executing certain deeds, to the satisfaction of the trustees;* but in case B. should die before he attained twenty-four, without leaving issue, then over. A. & B. were both infants at the testator's death: Held, that A. took a vested interest in possession, in the lands in W., but that B.'s interest in the rest of the estates was contingent on his attaining twenty-four, and doing the acts required. *Phipps* v. *Williams*, 311

4, Testatrix bequeathed her residue, in trust for her daughter Caroline for life, and after her death, for her grand-daughter if she should survive her mother, and attain twenty-one, but in case she should not survive her mother, and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death, as they attained twenty-one, and if all such other children of the testatrix's said daughter *should die before attaining twenty-one*, then in trust for L. M. The grand-daughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive his mother; afterwards the daughter died: Held, that the bequest over to L. M. took effect. *Mackinnon* v. *Sewell*, 327

5, Testator gave his real and personal estates to his wife, for life, remainder to his great nephew, F. W. son of his *late* nephew, and expressed it to be his particular wish and request that his wife, together with F. W.'s grandfather, should superintend and take care of his education, so as to fit him for any respectable profession or employment: Held, that F. W. was entitled to be maintained and educated, during his minority, in the manner described, out of the income of the testator's estates. *Foley* v. *Parry*, 350

6, Conditional bequest, "to the fellows and demies of *Magdalen College, Oxford*," upon the happening of a particular event, held void for uncertainty; the language of the condition, and the description of the legatees being so loose and obscure, that the court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking. *Attorney-General* v. *Sibthorp*, 413

7, A. testatrix gave 50*l.* long annuities to her sister M. T., and her said sister's husband for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the long annuities. *Townley* v. *Bolton*, 541

8, A testator gave to M. F., whom he afterwards married, among other bequests, 50*l.* long annuities, which he had purchased with 1000*l.* left him by the will of J. T. After his marriage he made a codicil by which he confirmed to his wife the benefits given to her by his will, in addition to the provisions made for her by her marriage settlement. He afterwards sold his long annuities, and with the produce purchased new annuities, which differed only from the long annuities by being terminable a quarter of a year sooner. Subsequently to this transaction, he made another codi-

LEGACY AND LEGATEE.

cil, by which he confirmed his will and former codicil: Held, that the legacy of 50*l.* long annuities was adeemed. *Pattison* v. *Pattison*, 473

9, A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease his property consisted of 600*l.* three per cent consols, and 119*l.* in sovereigns: Held, that the stock did not pass under the words "money;" under the words "free from all expense," the legacy of 100*l.* was to be paid discharged of duty. *Gosden* v. *Dotterill*, 495

LIEN.

The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title-deeds (which were in the possession of the plaintiff's solicitor for the purposes of the suit) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit, but the court ordered him to deposite them. *Baker* v. *Henderson*, 15

LIS PENDENS.

Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees: which was done. The new trustees then sold, part of the testator's real estates, to the plaintiff, who filed a bill for a specific performance: Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates; and that the new trustees had the same power of giving receipts as the original trustees had. *Drayson* v. *Pocock*, 127

LUNATIC.

Where a lunatic, who had no issue, was seised of an estate tail in possession, with the immediate reversion to himself in fee, and the land had been sold under the 1 W. 4. c. 65, for payment of his debts, an order was made on the committee to suffer a recovery on behalf of the lunatic, in order to complete the title to a purchaser. *In the Matter of Brand*, 542

MAINTENANCE.

Testator devised his real and personal estate to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren, till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship, on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and, on the death of each of them leaving such child, to convey the parent's share to such

MAINTENANCE.

child; and he empowered his trustees, after the death of the father of his grandchildren, to convey, to his grandsons, absolutely, the shares of his estates, to which, under the previous trusts, they would be entitled for their lives. A petition, by one of the grandsons, for an increase of the maintenance provided by the testator, was refused, the disposition of the property not being such as that the grandchildren must, of necessity, take the whole fund. *Turner* v. *Turner*, 198

MASTER'S CERTIFICATE.

The plaintiffs, under the decree, carried in interrogatories, for the examination of the defendants; the Master allowed some of the interrogatories, and disallowed others; the plaintiffs, before the Master had made his certificate, moved that he might be ordered to approve of the interrogatories which he had disallowed, or to receive others for the same purpose. Motion refused, the proper course being to wait till the Master has made his certificate, and then to except to it. *Chennell* v. *Martin*, 154

MERGER OF CHARGE.

A. devised his real estates to B. in fee, charged with 1000*l.*, which he gave, to B., in trust to be laid out for the separate use of C. his sister for her life, and, after her decease, as she should, by her will, appoint, and in default of appointment, to be retained by B.; B. devised the estates to trustees in trust for C. and D. as tenants in common, in fee, subject to his debts, &c.; and, by a codicil, he directed his personal estate to be first applied in payment of his debts, legacies, &c. After B.'s death, the trustees conveyed the estates to C. and D. as tenants in common in fee, subject to the 1000*l.*, and other incumbrances. C. and D. having agreed to make partition, one moiety of the estates was conveyed to C., in fee, subject to a term for indemnifying D. from the 1000*l.*, and the other moiety was conveyed to D. in fee. C. afterwards mortgaged her moiety in fee; and, by her will, without referring to the 1000*l.*, disposed of her personal estate in general terms: Held, that the 1000*l.* was merged. *Tyler* v. *Lake*, 160

MILITARY PRIZE.

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown.

A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the lords of the treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestuis que trusts* compel a distribution under it by a suit in equity against the trustees.

Semble, The crown may at any time before distribution, alter or revoke a grant of military prize. *Alexander* v. *The Duke of Wellington*, 383

MODUS.

A modus of three halfpence, payable by every occupier of land in the

MODUS.

parish, for every cow kept by him within the parish, in lieu of the tithes of the milk and calves of such cow, is good. *Tomlinson* v. *Lymer*, 213

2, A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden stuff is good, though it be not alleged to be growing in a garden. *Gronow* v. *Edwards*, 415

MORTGAGE.

1, A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis* v. *Battine*, 404

2, Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of B. and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a ecurity, and to pay the overplus to A.; B. was admitted, and died intestate without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be re-admitted as tenant in fee according to the custom of the manor:

That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt. *Weaver* v. *Maule*, 412

3, A mortgagee in fee died intestate as to his real estate, and his heir was not known. The court has no authority under the 1 W. 4. c. 60, s. 8, to appoint a person to re-convey the estate to the party entitled to the equity of redemption on his payment of the mortgage money to the executor of the mortgagee. *In re Goddard*, 480

NEXT FRIEND.

A testator by his will expressly excluded his wife from the guardianship of his children, and directed that, if she should obtain possession of them, the provision he had made for their maintenance should cease; and he appointed his executors to be their guardians. After the testator's death, his widow, as the answer alleged, forcibly removed one of the daughters from a school at which her father had placed her in his lifetime, and took the child abroad. She then filed a bill as next friend of the children, against the executors for an account of the testator's estate. The court directed the account to be taken, but referred it to the Master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made. *Arnott* v. *Bleasdale*, 177

NEXT OF KIN.

Where the words "next of kin," are used *simpliciter* in a gift over, and with-

NEXT OF KIN.

out any explanatory context showing a different intention on the part of the testator, they must be taken to mean next of kin according to the statute of distributions. *Hinckley* v. *Maclarens*, 480

OFFICE.

Receiver granted, at the suit of a judgment creditor, of the office of master forester of a royal forest. *Blanchard* v. *Cawthorne*, 259

ORDER AND DISPOSITION.

1, A., tenant in fee of a cotton-mill, in which there was a steam-engine, boilers, &c., mortgaged the mill, engine, boilers, &c., to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which however formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building: Held, that the steam engine was not in the order and disposition of A. at his bankruptcy. *Hubbard* v. *Bagshaw*, 148

2, A., a ship-owner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party afterwards was delivered to B. by A.'s direction, and B. gave notice, of the assignment, to C. Afterwards, but before the ship returned, A. became bankrupt: Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Douglas* v. *Russell*, 239

PARENT AND CHILD.

By the settlement on the second marriage of A. his intended wife's father settled estates on himself for life, remainder for the separate use of his daughter for life, remainder for the children of the marriage; and the trustees were directed to apply the rents, after the death of the survivor of the tenants for life, in the maintenance and education of the children during their minorities; and A. covenanted to permit his intended wife to enjoy, any future property that might accrue to her for her separate use; and her father covenanted that all the personal property he should die possessed of, should be settled on his daughter and her children, in the same manner as the property comprised in the settlement, subject to any other dispositions, qualifications or charges, that he might make by his will. The father died, having bequeathed his residuary estate to A. and appointed him his executor. A. entered into possession of the settled estates, and received the rents and mixed them with his own moneys. There was issue of the marriage two children. A. maintained them at his expense, and died having by his will given them benefits in real estates which it was alleged he had purchased, in part, with the rents of the settled estates: Held, that A. was a purchaser of the trusts for the maintenance and education of the children, and that his executors were entitled to be allowed, in account, the sums which it would have been proper to apply for those purposes: That the covenant by the father of the wife, was a provision against intestacy only: That the sums due from A. to his children, being a debt, were not satisfied by the benefits given them by his will; but an inquiry was directed as to what part of the real estates devised for their benefit, had been purchased, by A. out of the rents of the settled estates. *Stocken* v. *Stocken*, 77

PARTIES.

1, A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. and C. his sureties, in a covenant to pay an annuity to the plaintiff, and A. covenanted that, if he should survive his father, he would create a term in the estate, for securing the annuity. A.'s father died: and A. granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself und the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A., the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand, for which he should not be entitled to priority over the trust deed: Held, on demurrer, that the sureties were not, but that all the creditors who had executed the deed, were necessary parties: and that, as the bill alleged that the trust-deed had been executed by several of the creditors, the objection was properly made by demurrer. *Newton* v. *The Earl of Egmont*, 260

2, If on a demurrer, *ore tenus*, for want of parties, the plaintiff wishes to have permission to amend his bill more extensively than by merely adding parties, he must pay the costs of the demurrer. *Ibid.*

PARTNERSHIP.

A bill to have the accounts of a partnership taken without praying for a dissolution, is demurrable. *Loscombe* v. *Russell*, 5

PAYMENT OF MONEY INTO COURT.

Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify; the court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into court. *Anonymous*, 164

PEDIGREE.

1, Where, in a pedigree case, the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence, upon which the court will direct an issue to investigate a title depending on a question of pedigree. *Monkton* v. *The Attorney-General*, 431

2, *Semble*, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other, *Kidney* v. *Cockburn*, 441

PEDIGREE.

3, Where a *Scotch* sequestration had issued against a testator's heir, and it was necessary in a suit to have the testator's real representative before the court; the trustee under the sequestration, who was named as a defendant to the suit, and stated to be out of the jurisdiction, was held to be a sufficient representative of the testator's real estate. *Wilson* v. *Moore*, 530

PIN-MONEY.

The late Duchess of N. being entitled to pin-money charged upon estates to which the duke was entitled for his life, became a lunatic in 1782, and continued so till 1820, when she died. The late duke received all the rents of the estates, and maintained the duchess according to her rank: Held, that as the duchess was incapable of consenting to, or acquiescing in the duke's retaining her pin-money, his estate was accountable for all the arrears of the pin-money. *Earl Digby* v. *Howard*, 267

PLAINTIFF.

If a defendant admits a document, which is in the plaintiff's possession, to be to the effect stated in the bill, but does not ask leave to refer to it, the plaintiff is not compellable to produce it at the hearing. *Lett* v. *Morris*, 276

PLEA AND PLEADING.

1, A plea to a bill of discovery in aid of an action, which confesses and avoids some of the facts stated in the bill as the grounds of the action, and traverses others, will be overruled *Robertson* v. *Lubbock*, 82

2, Defendant brought an action for a libel against the plaintiffs; the plaintiffs pleaded a justification, and filed a bill for discovery, and a commission to examine witnesses abroad, in support of their pleas. The defendant pleaded to the bill, that he had discontinued the action. Plea overruled, as defendant might commence another action. But, upon defendant afterwards undertaking not to bring any other action, and to pay the costs of the suit, all further proceedings were stayed. *Wilmot* v. *Maccabe*, 120

3, After an original cause is at issue, the plaintiff cannot file a supplemental bill for the purpose of changing the issue raised, by obtaining a discovery of facts and documents, which might have been introduced by amendment into the original bill, although the supplemental bill alleged that those facts and documents were not known to the plaintiffs till after the original suit was at issue. *Colclough* v. *Evans*, 40

4, A bill of revivor against new parties ought to state so much of the original bill as shows that the plaintiff is entitled to revive, otherwise it is demurrable. *Phelps* v. *Sproule*. 144

5, A. died, having made B. his executor, who, without proving A.'s will, possessed part of his assets. B. died and made C. his executrix, who proved his will and took out administration to A. A bill was filed against C. for an account of A.'s assets possessed by her and by B. Afterwards C. died, having made D. her executor, and E. took out administration to A. Plaintiff filed a bill of revivor and supplement against D. and E., to which D. demurred, and the demurrer was allowed. *Ibid.*

6, A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. and C. his sureties, in a covenant to pay an annuity to the plaintiff, and A. covenanted that if he should survive his father, he would create a term in the estate, for secur-

PLEA AND PLEADING.

ing the annuity. A.'s father died: and A. granted other annuities to the plaintiff, but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, and one of them, on behalf of himself and the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, the plaintiff filed his bill against A., the trustees, and the plaintiff in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself and the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, and might have the benefit of the decree as to that part of his demand, for which he should not be entitled to priority over the trust-deed: Held, on demurrer, that the sureties were not, but that all the creditors who had executed the deed, were necessary parties; and that, as the bill alleged that the trust-deed had been executed by several of the creditors, the objection was properly made by the demurrer. *Newton* v. *The Earl of Egmont*, 260

7, If a plaintiff when his cause is in such a state that he cannot amend his bill, discovers new matter which may tend to show that he is entitled to the relief prayed, he may file a supplemental bill, for the purpose of putting the new matter in issue. *Crompton* v. *Wombwell*, 286

8, In 1800, A. B. & C. entered into partnership as attorneys, upon certain terms expressed in a memorandum. In 1808, A. died, leaving B. his executor and residuary legatee, and then B. & C. formed a partnership, and agreed to share the profits equally. In December, 1825, their partnership was dissolved by consent. During the former partnership A. & B. had made advances, both jointly and severally, for C.'s private use: and during the latter partnership B. made similar advances. In 1827, B. became bankrupt. No settlement of accounts having taken place between any of the parties, in July, 1831, B.'s assignees filed a bill, against B. & C., for an account of the dealings of both partnerships, and of all the advances made by A. & B. C. pleaded the statutes of limitations (21 Jas. 1. & 9 Geo. 4.) to so much of the bill as related to such advances: Held, that as the plea extended to the joint advances of A. & B. during the first partnership, it covered too much, and was, therefore, bad. *Robinson* v. *Field*, 296

9, To a creditor's bill, the defendants pleaded a decree obtained by other creditors in a prior suit.

Plea overruled: the decree being less beneficial to the plaintiffs than they might obtain in their own suit. *Pickford* v. *Hunter*, 342

10, A bill against the directors of an unincorporated joint stock company by a holder of shares, of which some were original, and others derivative, alleging a fraud, whereby the defendants had profited at the expense of the company, and praying that they might account for such profits to the partnership: Held, to be demurrable, because it did not specifically state the mode in which the plaintiff became a shareholder, and the manner of his holding, or whether, as to his derivative shares, he had performed the conditions upon which, as appeared from the regulations of the company, the transfer of shares was to be permitted.

Semble, The persons by whom the shares were assigned to the plaintiff ought to have been made parties. *Walburn* v. *Ingilby*, 498

PORTION.

Where, under a settlement, a sum of money is to be raised, out of real estates, for the portions of younger children, and some of the portions have become payable, the court will raise the whole sum at once, although some of the children have not acquired vested interests. *Gillibrand* v. *Goold*, 355

POWER.

1, A. tenant in tail under his brother's will, with remainders over, suffers a recovery to such uses as he should appoint by deed or will, and subject thereto to the uses of the will. He afterwards makes a mortgage of part of the estate in fee, and limits the equity of redemption to the prior uses. He then joins in a transfer of the mortgage, and reserves the equity of redemption to himself in fee: Held, that the equity of redemption did not revert to the old uses. *Anson* v. *Lee*, 167

2, A power over personal property was required to be executed by a will signed and published in the presence of, and attested by two witnesses. The donee professed to exercise the power by a will which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign in their presence, and the witnesses, at different times, signed an attestation that the testatrix had signed and delivered the will, in their presence: Held, that though delivery was equivalent to publication, the power was not well exercised. *Simeon* v. *Simeon*, 253

3, The testator bequeathed 12,000*l.* stock, to trustees, for his son for life, then for the son's wife for life, then, unto and amongst the wife and children, in such shares, for such interests, &c. as the son should appoint, and, in default of appointment, unto the children, equally, and if there should be no child, then to the son's next of kin in blood: and the testator bequeathed his residue to his son and his, the testator's, two other children, their executors, &c. equally: and he directed that, the share of his son should be held, by his trustees, for the benefit of him and his children, upon the same trusts, and subject to the same limitations, &c., as the 12,000*l.* stock, but that the son's wife should not take any interest in that share. The son died leaving his wife surviving, but never having had a child: Held, that an appointment made by the son of part of the stock, to his wife, was good; but that the son, in the events that had happened, was not entitled to the share of the residue absolutely, but that his next of kin in blood were entitled to it. *Houstoun* v. *Houstoun*, 278

4, A married woman having power to dispose of property, by her will, executed as required by the power, but not referring to it, gave to her husband all the property which she might die possessed of, or have in reversion or in expectation: Held, not to be an execution of the power. *Lempriere* v. *Valpy*, 335

5, Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint:

Held, that the wife could appoint only by will, and that children living at

POWER.

her death were only entitled to share in an unappointed portion of the fund. *Walsh* v. *Wallinger*, 405

6, Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment, to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins* v. *Myall*, 409

7, A daughter being entitled under the marriage settlement of her father and mother to such share and interest in lands and money, as the surviving mother should appoint, provides by her own marriage settlement, that all such share and interest to which she should become entitled, under her mother's settlement, should be vested in trustees to the use of her intended husband for life, remainder to herself for life, remainder to the children of the marriage.

Four years after the marriage, the mother appoints a sum of 3000*l.* to be paid to the trustees of the daughter's settlement, upon the uses therein expressed, in satisfaction of the daughter's share and interest under the marriage settlement of the father and mother: Held, that this was substantially an appointment to the daughter, and therefore valid. *Limbard* v. *Grote*, 467

8, R. M. made a settlement of real estate to the use of himself for life, with a power to appoint to any one or more of his sons in fee or otherwise, and in default of appointment, to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and subsequently to his bankruptcy appointed to his eldest son in fee: Held, that the appointment could not enure as an appointment to a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power.

Quære, Whether the power was destroyed by the bankruptcy, the court considering that the invalidity of the appointment rendered it unnecessary to determine that point. *Badham* v. *Mee*, 483

POWER OF SALE.

1, A power of sale is not void although the exercise of it is not expressly confined within the line of perpetuity. *Biddle* v. *Perkins*, 69

2, An Act of Parliament reciting a will by which estates were devised to A. for life, remainder to his first and other sons in tail, remainder to B. in tail, and that B. had suffered a recovery to the use of A. in fee, directed the estates to be sold, and other estates to be purchased, and conveyed to such of the uses of the will as at the time of the sale, should be existing, undetermined, and capable of taking effect. The estates were sold, and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, &c.: Held, that B. did not take an estate tail in the purchased estates. *Wortham* v. *Mackinnon*, 219

PRACTICE.

1, Where in an examination put in by two co-executors it was stated that their receipts had been joint, but it appeared, by affidavit, that that state-

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ment was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing; liberty was given to him to put in a supplemental examination, to correct the mistake. *Hewes* v. *Hewes*, 1

2, Mode of proceeding to take a bill *pro confesso* against a defendant in contempt for want of answer, and who is in custody of the Warden of the Fleet. *Bilton* v. *Bennett and Wife*, 9

3, The plaintiffs sued as devisees of A.: but omitted to prove his will: and the bill was dismissed. They afterwards presented a petition of re-hearing, and moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, and the will not being the subject of dispute in the cause. *Hood* v. *Pimm*, 52

4, Affidavit under 11 Geo. 4. and 1 Will. 4. c. 36, s. 15, rule 1, by whom to be made. *Handfield* v. *Woolley*, 62

5, The 15th order does not apply to an amendment by adding parties only. *Brattle* v. *Waterman*, 63

6, If, in a suit to establish a will, the heir admits the will, and dies before the hearing, the derivative heir is bound, and the will need not be proved. *Robinson* v. *Cooper*, 67; *Lock* v. *Foote*, *Ibid.*

7, If a plaintiff gives a notice of motion, and dies before it is made, and his executors revive, the court will not give the defendants the costs as of a motion abandoned. *Warner* v. *Armstrong*, 72

8, The object of the suit was to set aside certain long leases granted in 1740, and which became vested in the defendant, who had made family settlements of them, which he admitted to be in his custody: Held, that the plaintiff, was entitled to a production of those settlements. *The Attorney-General* v. *Ellison*, 118

9, The 4th of Lord Lyndhurst's orders relates to exceptions for insufficiency only. *Bradbury* v. *Booker*, 147

10, The plaintiffs, under the decree carried in interrogatories for the examination of the defendants; the Master allowed some of the interrogatories, and disallowed others; the plaintiffs, before the Master had made his certificate, moved that he might be ordered to approve of the interrogatories which he had disallowed, or to receive others for the same purpose: motion refused, the proper course being to wait till the Master has made his certificate, and then to except to it. *Chennell* v. *Martin*, 154

11, Motion to discharge a Master's certificate of the sufficiency of the defendant's examination under a decree, refused; the proper course being to except to the Master's certificate. *Chalk* v. *Thompson*, 159

12, Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify; the court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into court. *Anonymous*, 164

13, Executor of a deceased plaintiff filed a bill of revivor, but did not obtain an order to revive. Motion, by defendant, that the executor might revive within a given time, or both bills be dismissed with costs to be paid by the executor. Motion granted as to the bill of revivor only. *Troward* v. *Bingham*, 218

14, Where a defendant, who is the only defendant, absconds, the bill cannot be taken *pro confesso* against him under 11 Geo. 4, and 1 Will. 4, c.

PRACTICE.

36, on motion, but the cause must be set down for hearing. *Turner* v. *Turner*, 198

15, Course of proceeding to take a bill *pro confesso* under the above act, against a sole defendant, who has absconded. *Baker* v. *Keen*, 225

16, In a creditor's suit, the plaintiffs are entitled to their costs, as between solicitor and client, though the fund is insufficient to pay the debts. *Tootal* v. *Spicer*, 231

17, Where a person takes forcible possession of estates over which a receiver has been appointed, an order for his commitment will be made without an order *nisi* being previously obtained. *Broad* v. *Wickham*, 232

18, A defendant who has joined in commission cannot obtain a new commission, except upon a special application and with notice. *Bond* v. *Bond*, 235

19, An action having been brought against the plaintiffs, whose witnesses were about to leave England for New York, they applied to the Chief Justice of the King's Bench, under 1 Will. 4, c. 22, for a commission to examine their witnesses before the trial. But his lordship ordered them to be examined *vivâ voce* before a gentleman of the bar, with liberty to the defendants to attend and cross-examine them. The plaintiffs took no proceedings under that order, but their witnesses having shortly afterwards gone to New York, they filed a bill in this court, and afterwards moved for a commission to examine their witnesses there: Motion granted. *Grinnell* v. *Cobbold*, 249

20, If the Master does not decide, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them unless by consent. *Gibbs* v. *Payne*, 253

21, If a general demurrer is overruled, but leave is given to amend, and the bill is amended by adding a party merely; the defendant may nevertheless put in a general demurrer to the amended bill. *Bosanquet* v. *Marsham*, 259

22, If on a demurrer, *ore tenus*, for want of parties, the plaintiff wishes to have permission to amend his bill more extensively than by merely adding parties, he must pay the costs of the demurrer. *Newton* v. *The Earl of Egmont*, 260

23, A defendant, who was in contempt for not answering the bill, on being brought to the bar of the court, under 11. Geo. 4. and 1 Will. 4. c. 36, rule 6, deposed that she was unable, by reason of poverty, to employ a solicitor to put in her answer, upon which the usual reference was made to the Master. The defendant refused to make any statement to the Master, as to the subject of the reference. Upon which the court ordered proceedings to be taken under the second rule of the act, for taking the bill, *pro confesso*, against her. *Williams* v. *Parkinson*, 325

See also Atkinson *v.* Flint, 327

24, In computing the eight days within which cause must be shown against confirming a report absolutely, the day on which the order *nisi*, was served, must be reckoned: but, if the eighth day is a holiday, one day more will be allowed. But *see* the note at the end of this case. *Manners* v. *Bryan*, 354

25, Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the court, the suit cannot proceed in his absence. *Browne* v. *Blount*, 407

26, In a case of account, in which the Master had stated, that it was in his

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mind impossible to arrive at that degree of certainty which he was anxious to obtain, the court allowed an exception to his report upon reasonable presumption. *Fenner* v. *Agutter*, 527

27, To ground an order for the serjeant at arms under the 1 W. 4. c. 36, s. 15, rule 1, the affidavit must state the party's belief that at the time of suing forth the attachment the defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county. *Handfield* v. *Wildes*, 411

28, To ground an order for the serjeant at arms under the 1 W. 4. c. 36, s. 15, rule 1, the affidavit need not state the party's belief that due diligence has been used in ascertaining the defendant's residence, and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the court of their truth. *Wright* v. *Green*, 412

29, The court will not make an order for the publications of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive. *Barnsdale* v. *Lowe*, 428

30, After a residuary fund had been paid into the exchequer, under a decree establishing the right of the crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the crown, to go before the Master for the purpose of making out their claim. *Monkton* v. *The Attorney-General*, 431

PRIORITY OF INCUMBRANCES.

A. being possessed of a leasehold house, deposited the lease with B. as a security for a debt. C. afterwards obtained a judgment against A., and sued out a *fi. fa.* The sheriff sold some of A.'s goods, but not the house, and returned the writ: whilst the writ was in the sheriff's hands, D. with A.'s consent, paid the debt due to B., and had the lease deposited with him as a security for the amount, and for other sums due to him, from A.: Held, that C. having allowed the writ to be returned, without requiring the sheriff to sell the house, had no priority over D. *Williams* v. *Craddock*, 142

PRO CONFESSO.

1, Mode of proceeding to take a bill *pro confesso* against a defendant in contempt for want of answer, and who is in custody of the Warden of the Fleet. *Bilton* v. *Bennett and Wife*, 9

2, Where a defendant, who is the only defendant absconds, the bill cannot be taken *pro confesso* against him under 11 Geo. 4. and 1 Will. 4. c. 36, on motion, but the cause must be set down for hearing. *Turner* v. *Turner*, 225

3, Course of proceeding to take a bill *pro confesso* under the above act, against a sole defendant who has absconded. *Baker* v. *Keen*, 225

PRODUCTION OF DOCUMENTS.

1, The object of the suit was to set aside certain long leases granted in 1740, and which became vested in the defendant, who had made family settlements of them, which he admitted to be in his custody: Held, that the plaintiff was entitled to a production of those settlements. *The Attorney General* v. *Ellison*, 118

2, A defendant who had pleaded moduses to a bill for tithes filed by the rector's lessee, was ordered, on motion, to produce all the documents in his possession which had belonged to a former lessee of the rectory, and

PRODUCTION OF DOCUMENTS.

also all the other documents in his custody relating to the matters in dispute, except those which tended to show the existence of the moduses. *Tomlinson* v. *Booth*, 213

RECEIPTS.

1, An owner of lands in the parish is a good witness to prove the custody of old receipts for moduses, alleged to be payable for his lands, notwithstanding he has agreed to contribute to the costs of the suit. *Tomlinson* v. *Lymer*, 213

2, Old receipts for tithes and moduses expressed merely to have been given to A. for sums received of him by B. on account of C. sufficiently appear to relate to the parish, it having been proved that persons of those names were respectively, at the dates of the receipts, an owner of lands in the parish, and curate and rector thereof: and such receipts, having been found by A. amongst his late father's papers, under whom he claimed, are admissible in evidence, to prove the moduses. *Ibid.*

RECEIVER.

Receiver granted at the suit of a judgment creditor, of the office of master forester of a royal forest. *Blanchard* v. *Cawthorne*, 259

RECOVERY.

By a marriage settlement, an estate was limited to the husband for life, remainder to trustees for five hundred years, for raising younger children's portions, remainder to the sons of the marriage in tail. By an agreement indorsed on the settlement before its execution, and signed by the husband and the father of the lady, it was agreed that, if the lady should die without leaving issue of the marriage, the husband after her death, should pay, to her father, 600*l.*, and that, in default of payment, it should be raised by demise, &c. of the term. There was issue of the marriage a son and a daughter, the latter died an infant in her mother's lifetime, the son attained twenty-one, and suffered a recovery, and he also died in his mother's lifetime: Held, that notwithstanding an estate tail had vested, in the son, before the 600*l.* was raiseable, the recovery did not defeat that charge. *Eales* v. *Conn*, 34

REMOTENESS.

Testator bequeathed his residuary estate to trustees, in trust, as to one-third, for his daughter for life, and after her decease, in trust for her children, and to be paid to them on attaining twenty-five; but if his daughter should leave but one child her surviving, then the whole third to go to and become the property of such only child upon its attaining twenty-five, and be transmissible to its executors; but, in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over: Held, that the bequest to the children, was void for remoteness. *Hunter* v. *Judd*, 210

RESTRAINT ON ALIENATION.

1, Testator gave a sum of money for the separate use of his daughter, a *feme sole*; and declared that she should not be at liberty to sell or dispose of it, and if she attempted so to do, that such sale should be void. The daughter afterwards married: Held, that the restraint on alienation was void, there being no gift over. *Newton* v. *Reid*, 72

RESTRAINT ON ALIENATION.

2, By a marriage settlement an annuity for the life of the wife s mother, was assigned, to trustees, for the wife, for life, remainder for the husband, for life, remainder for the issue of the marriage. Provided that if the husband should, during the life of the wife, or of her mother, become bankrupt, compound with, or assign his effects for the benefit of his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, and signed an unstamped agreement to deposit the settlement with him, and authorizing him to retain the annuity so sold, out of the settled annuity: Held, that the husband had forfeited his interest in the settled annuity. *Stephens* v. *James*, 226

3, A testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. *Woodmeston* v. *Walker*, 457

4, A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy. *Brown* v. *Pocock*, 464

SCANDAL AND IMPERTINENCE.

The 12th of the new orders does not apply to affidavits in bankruptcy, which have been referred for scandal and impertinence. *Ex parte Chester in re Yates*, 7

SEPARATE USE.

1, Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim;* and as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use. *Tyler* v. *Lake*, 450

2, Bequest of dividends of stock to a *feme covert* for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof: Held, that the legatee, on becoming discovert, might validly dispose of her entire life-interest. *Jones* v. *Salter*, 463

SHIFTING CLAUSE.

W. G. by his will dated in 1775, devised his estates to his nephew for life, with remainders to his first and other sons in tail male. T. G. the

SHIFTING CLAUSE.

nephew's eldest son, after his father's death suffered a recovery, and limited the estates to himself for life; remainder, subject to a term for securing a jointure and raising portions for his younger children, to his first and other sons in tail male. S. F. by his will dated in 1804, devised his estates to trustees, in trust for the second and subsequently born sons of T. G. in tail male: provided that, if the lands devised by W. G. to T. G. in tail male, should descend to or devolve upon any son of T. G., or any heir male of such son, and the person on whom those lands should descend or devolve, should, under the trusts of his, S. F.'s will, be tenant in tail male of his estates, so as to be then actually in the possession or receipt of the rents and profits thereof, then his estates should be in trust for the person who would be entitled to his estates under his will, if the person on whom W. G.'s estates had so descended or devolved, were dead without issue. T. G. had three sons: the eldest died in his lifetime; then T. G. died: Held, that as W. G.'s estates came to T. G.'s second son, encumbered with the term, S. F.'s estates did not go over under the shifting clause. *Fazakerly* v. *Ford*, 179

SHIP.

1, An assignment, by the owners of a ship, of freight *to be earned*, is good. *Douglas* v. *Russell*, 239

2, A part-owner of a ship, which had been let to the East India Company for a voyage to India, after the other part-owner had expended a large sum in repairing it, and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part-owner to give security for his share: the ship afterwards sailed to India, and returned home: Held, that the part-owner who had taken the security, was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs and outfit. *Davis* v. *Johnston*, 246

SOLICITOR AND CLIENT.

1, The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title-deeds (which were in the possession of the plaintiff's solicitor for the purpose of the suit) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit; but the court ordered him to deposit them. *Baker* v. *Henderson*, 15

2, A solicitor whose bill had been taxed and more than one-sixth taken off, brought an action against his client, before the costs of taxation were ascertained, for the amount so taxed; the court granted an injunction to restrain the action. *Barr* v. *Wiggins*, 64

3, The court has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit. *Frankland* v. *Lucas*, 266

4, On a bill which sought to charge a solicitor with a fraud practised on the plaintiffs in the course of proceedings on his client's behalf, the court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications, made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody.

And, generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such

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business had no reference to legal proceedings, either existing or in contemplation. *Greenough* v. *Gaskell*, 516

SPECIFIC PERFORMANCE.

1, A. being entitled to nine-sixteenths only of an estate, agrees, by mistake, to sell, the entirety, to B. *Semble*, that a specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially where C. has a lien on the estate for a debt which would exhaust nearly the whole of the purchase-money. *Wheatley* v. *Slade*, 64

2, A. leased premises to B. for ten years; and B. covenanted *not to assign* the premises, without A.'s consent. A. agreed to grant to C. a lease for ten years, from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C, died, before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets), for a special performance of the agreement, and offered so to qualify the covenants of the lease, as that the executors should be no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Phillips* v. *Everard*, 332

3, In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the court having decided against the plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs. *Kendall* v. *Beckett*, 410

SUPPLEMENTAL ANSWER.

1, The defendant, an attorney, moved to file a supplemental answer to deny admissions in his answer that went to establish the plaintiff's case, on the ground of having, on examining his books, discovered that the admission ought not to have been made. Motion refused. *Greenwood* v. *Atkinson*, 29

2, Leave given to file a supplemental answer for the purpose of stating facts which the defendant had wished to state in his original answer, but had been prevailed upon to omit, by the mistaken advice of his solicitor. *Nail* v. *Punter*, 214

SUPPLEMENTAL BILL.

1, After an original cause is at issue, the plaintiff cannot file a supplemental bill for the purpose of changing the issue raised, by obtaining a discovery of facts and documents, which might have been introduced by amendment into the original bill, although the supplemental bill alleged that those facts and documents were not known to the plaintiff till after the original suit was at issue. *Colclough* v. *Evans*, 40

2, If a plaintiff, when his cause is in such a state that he cannot amend his bill, discovers new matter which may tend to show that he is entitled to the relief prayed, he may file a supplemental bill, for the purpose of putting the new matter in issue. *Crompton* v. *Wombwell*, 286

SUPPLEMENTAL EXAMINATION.

Where in an examination put in by two co-executors, it was stated that their receipts had been joint, but it appeared, by affidavit, that that statement

SUPPLEMENTAL EXAMINATION.

was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination, to correct the mistake. *Hewes* v. *Hewes*, 1

TENANCY IN COMMON.

Bequest to A. for life, and, after her decease, to her children, when they arrived at twenty-one; A. had two children, both of whom attained twenty-one: Held, that they were tenants in common. *Woodgate* v. *Unwin*, 66

TITHES.

1, The tithe-calf is the tenth in order of birth. *Carrington* v. *Cornock*, 108

2, In a suit for tithes by a rector against occupiers, the defendants pleaded a modus, to be payable to the vicar for the tithes claimed: Held, first, that a copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff, (the bishop's registry having been searched, for the original, without success), and that no search was necessary, either in the augmentation office, or in the vicar's house, although it was expressed, in the instrument, that one part of it was to remain with the vicar. Second, That a terrier appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved, and by the churchwardens, was admissible, for the plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. Third, That the decrees, but not the interrogatories and depositions, in two former suits, one in the Exchequer, and the other in Chancery, for the tithes of a particular farm in the parish, but which was not included in the present suit, were admissible for the defendants. *Tucker* v. *Wilkins*, 120

3, A defendant who had pleaded moduses to a bill for tithes filed by the rector's lessee, was ordered, on motion, to produce all the documents in his possession which had belonged to a former lessee of the rectory, and also all the other documents in his custody relating to the matters in dispute, except those which tended to show the existence of the moduses. *Tomlinson* v. *Booth*, 213

4, A modus of three halfpence, payable by every occupier of land in the parish, for every cow kept by him within the parish, in lieu of the tithes of the milk and calves of such cow, is good. *Tomlinson* v. *Lymer*, 213

TITLE TO LAND.

The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question. *Monypenny* v. *Bristow*, 415

TRUST.

The commercial correspondents of executors, acting under a power of attorney, held to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them, and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge, on the part of the correspondents, that the stock was part of the testator's assets.

TRUST.

There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust. *Wilson* v. *Moore*, 531

VENDOR AND PURCHASER.

1, A father, tenant for life, with remainder to his son in tail, joins with his son in conveying the estate to trustees in trust to sell, and to pay 30,000*l.* to the father and the residue to the son: and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to defendant, and afterwards judgments were entered up against the father: Held, that the existence of the judgments was no objection to the title. *Lodge* v. *Lyseley*, 37

2, A. being entitled to nine-sixteenths only of an estate, agrees, by mistake, to sell the entirety to B. *Semble*, that a specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase-money, especially where C. has a lien on the estate for a debt which would exhaust nearly the whole of the purchase-money. *Wheatley* v. *Slade*, 64

3, A power of sale is not void, although the exercise of it is not expressly confined within the line of perpetuity. *Biddle* v. *Perkins*, 69

4, Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold, part of the testator's real estates, to the plaintiff, who filed a bill for a specific performance: Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates; and that the new trustees had the same power of giving receipts as the original trustees had. *Drayson* v. *Pocock*, 127

VESTING OF LEGACIES.

1, Testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life, and directed that, at the end of twelve months after her death, 1000*l.* should be laid out in trust for his daughter for life, and, after her decease to divide the capital amongst her children, when they should attain twenty-one. One of the children attained twenty-one and died in the lifetime of testator's widow: Held, that his representatives were entitled to a share of the 1000*l.* *Cousins* v. *Schroder*, 12

2, Testator devised real estates to A. for life, remainder to B. in fee. And he gave a legacy to C., to be paid to her by B., within twelve months after A.'s death: and he charged his estate with the legacy; and appointed A. his executrix. C. died in A.'s lifetime: Held, that the legacy did not lapse. *Poole* v. *Terry*, 133

WARRANT OF ATTORNEY.

A clergyman granted an annuity, and secured it by a conveyance of his bene-

WARRANT OF ATTORNEY.

fice, and by a warrant of attorney: Held, that the conveyance was void, but the warrant of attorney good. *Aberdeen* v. *Newland*, 127

WILL.

1, Testatrix directed that her land at M. should, as the rents became due, be equally divided amongst the youngest of her son's children; the son left four daughters (one of whom was his eldest child), and a son: Held, that the daughters, including the eldest, took an estate in fee in the land, it appearing, by the context of the will, to be the testatrix's intention to exclude an eldest son only. *Hall* v. *Luckup*, 3

2, Testator gave 1000*l.* to his natural son, and, if he died under twenty-one, then that sum and the residue, to go to the testator's family: and he gave the residue to his natural son to be applied as above directed. The son died under twenty-one: Held, that the 1000*l.* was part of the residue, and did not pass to the testator's next of kin as a legacy. *Breashur* v. *Dor*, 11

3, Testator gave all his real and personal estate, after payment of debts and legacies, to his wife for life, and directed that, at the end of twelve months after her death, 1000*l.* should be laid out in trust for his daughter for life, and, after her decease to divide the capital amongst her children, when they should attain twenty-one. One of the children attained twenty-one and died in the lifetime of testator's widow: Held, that his representatives were entitled to a share of the 1000*l.* *Cousins* v. *Schroder*, 12

4, Bequest to A. for life, and, after her decease, to her children, when they arrived at twenty-one. A. had two children, both of whom attained twenty-one: Held, that they were tenants in common. *Woodgate* v. *Unwin*, 66

5, Testator bequeathed 12,000*l.* stock, to trustees, for his son for life, then for the son's wife for life, then, unto and amongst the wife and children in such shares, for such interests, &c. as the son should appoint, and, in default of appointment, unto the children, equally, and if there should be no child, then to the son's next of kin in blood: and the testator bequeathed his residue to his said son and to his, the testator's two other children, their executors, &c. equally: and directed that the share of his said son should be held by his trustees for the benefit of him and his children, upon the same trusts, and subject to the same limitations, &c., as the 12,000*l.* stock, but that the son's wife should not take any interest in that share. The son died leaving his wife surviving, but never having had a child: Held, that an appointment made by the son of part of the stock, to his wife, was good; but that the son, in the events that had happened, was not entitled to the share of the residue absolutely, but that his next of kin in blood were entitled to it. *Houstoun* v. *Houstoun*, 278

6, A deed executed under circumstances which render it void in equity, and not at law, is a revocation of a prior will. *Simpson* v. *Walker*, 289

7, Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest

WILL.

was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That as the defence of the statute of limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title was accrued; and,

That the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee. *Monypenny* v. *Bristow*, 415

8, Where a testator directs his trade to be carried on after his death, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Thompson* v. *Andrews*, 525

END OF VOL. VI.